SUPREME COURT, U. S.
AUG 9 1974
MICHAEL RODAK, JR., CLERK

SINGLE APPENDIX

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-717

ALEXANDER J. ANTOINE and IRENE F. ANTOINE, *his wife*,
Appellants,

v.

THE STATE OF WASHINGTON,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

AUGUST 1974

JURISDICTIONAL STATEMENT FILED
OCTOBER 31, 1973
PROBABLE JURISDICTION NOTED JUNE 17, 1974

CRAFTSMAN & NET PRESS SEATTLE, WASHINGTON

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Attorneys for Appellant:

MASON D. MORISSET
ZIONTZ, PIRTLE, MORISSET & ERNSTOFF
3101 Seattle-First National Bank Building
Seattle, Washington 98154
Telephone (206) 623-1255

Attorneys for Respondent:

SLADE GORTON,
Attorney General for the State of Washington
JOSEPH L. CONIFF,
Assistant Attorney General
Temple of Justice
Olympia, Washington 98501
Telephone (206) 753-6200

RELEVANT DOCKET ENTRIES

Title of Case:

ALEXANDER J. ANTOINE and IRENE F. ANTOINE, *his wife, Appellants,*

v.

THE STATE OF WASHINGTON
Respondent.

Date	Proceedings	Single Appendix Page No.
1971		
Sept. 11	Appellants cited by State of Washington Game Protector.	(not included)
Oct. 18	Appellants tried in Ferry County District Court.	(not included)
Nov. 1	Judgment of guilty announced by Ferry County District Court.	(not included)
Nov. 9	Notice of Appeal to the Superior Court of the State of Washington for Ferry County filed.	(not included)
1972		
Jan. 14	Trial of appellants in Superior Court and oral opinion of the court finding appellants guilt.	(not included)
May 18	Judgment and sentence of trial court filed.	15
Aug. 9	Findings of Fact and Conclusions of Law of trial court filed.	12
May 18	Notice of Appeal to Washington Supreme Court filed.	(not included)

Date	Proceedings	Single Appendix Page No.
1973		
July 12	Opinion of the Washington State Supreme Court upholding appellant's conviction.	18
Aug. 14	Remittitur issued by Washington Supreme Court making judgment of the Washington Supreme Court final as of August 13, 1973.	36
Sept. 19	Notice of Appeal to the U.S. Supreme Court filed.	(not included)
Oct. 31	Jurisdictional statement and case filed and case docketed with the U.S. Supreme Court.	(not included)
1974		
June 17	Probable juridiction noted by the U.S. Supreme Court.	(not included)

Executive Order Dated July 2, 1872

EXECUTIVE MANSION
Washington, July 2, 1872

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U.S. GRANT

1891 AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION

(Defendant's Exhibit No. 4)

Articles of Agreement—made and entered into on the 9th day of May A.D. 1891 at the Colville Indian Reservation in the State of Washington by Mark A. Fullerton, W. H. H. Dufur and James F. Payne Commissioners on the part of The United States appointed for the purpose, and The Indians residing on said reservation.

Article 1

The said Colville Indians residing and having their homes on the said Colville Indian Reservation upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their rights, title, claim and interest in and to and over the following described tract of Country on the Colville Indian Reservation ~~in the~~ State of Washington, viz.

Beginning at a point on the Eastern boundary line of the Colville Indian Reservation where the township line between townships 34 & 35 North of Range 37 East of the Willamette Meridian if extended West would intersect the same, said point being in the middle of the Channel of the Columbia River, and running thence West parallel with the forty ninth (49) parallel of latitude to the Western boundary line of the said Colville Indian Reservation in the Okanogan River, thence North following the said Western boundary line to the said forty ninth (49) parallel of latitude, thence East along the said forty ninth (49) parallel of latitude to the North East corner of the said Colville Indian Reservation, thence South following the Eastern boundary of said reservation to the place of beginning con-

taining by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian Reservation created by Executive order dated April 9th, 1872.

Article 2

Each and every Indian now residing upon the portion of the Colville Indian Reservation hereby ceded and relinquished and who is so entitled to reside thereon shall be entitled to select from said ceded portion Eighty acres of land which shall be allotted to such Indian in severalty. No restrictions as to locality shall be placed upon such selections other than that they shall be so located as to conform to the Congressional survey or sub-divisions of said tract or country, and any Indian having improvements may have the preference over any other person in and to the tract of land containing such improvements so far as they are within a legal sub-division not exceeding in area the quantity of land that he or she may be entitled to select and locate. All such allotments shall be made at the cost of the United States under such rules and regulations as The Secretary of the Interior may from time to time prescribe.

Article 3

All Indians residing in the lands hereby ceded and relinquished shall have the right if they so prefer under the direction of the Indian Agent to occupy and reside on such portions of the Colville Indian Reservation not hereby ceded as are not occupied by or in the possession of any other Indian or Indians.

Article 4

Whereas the lands used and occupied for School purposes at what is known as the Tonasket School on Buona-

parte Creek on said reservation have been ceded and relinquished to the United States, it is agreed and stipulated that in lieu thereof the United States will provide for a School site and school purposes a tract of land conveniently and desirably located upon the Colville Indian Reservation hereby ceded to contain Six Hundred and forty acres and upon the same at the cost of the United States, will erect suitable buildings for an Indian School and in all respects provide for the conduct, equipment and maintenance thereof as Indian Schools are now provided for, it being expressly understood and agreed that no part of the purchase money hereinafter mentioned of the lands hereby ceded is to be employed or expended in the erection of school buildings or in the maintenance of Indian Schools upon said Reservation. And it is further stipulated that in lieu of the Saw Mill, Grist Mill and other Mill property hereby ceded, the United States will provide a suitable and convenient Mill Site and will thereon at its own cost erect suitable buildings and place all necessary fixtures.

Article 5

That in consideration of the cession surrender and relinquishment to the United States of all the title, claim, rights, estate and interest of said Indians in and to the tract of land above described, the United States will pay to the said Indians, the beneficiaries of this agreement, to be distributed per capita, the sum of One Million Five Hundred Thousand Dollars payable in five annual installments of Three Hundred Thousand Dollars each, with interest thereon at five per centum after this agreement shall take effect.

In all such payments each and every Indian aforesaid

over the age of Eighteen years shall receive and receipt for his or her share of said purchase money as the same becomes due and payable, and with respect to the share of each and every Indian aforesaid who shall be under Eighteen years of age, the same shall be invested under the direction of the Secretary of the Interior for the benefit of such Indians at a rate of interest not less than five per centum per annum, and the interest thereof with so much of the principal as may be deemed necessary and proper, shall be paid annually to the father of such Indian so entitled and under the age of Eighteen years, if living, and if such father be dead, then the same shall be paid to the mother, if living, and in the event the said mother be dead, then the same shall be paid to the Indian Agent of the Colville Reservation for the use and maintenance of such orphan, and when such minors shall attain their majority, their shares in such purchase money, or so much thereof as may remain unpaid, shall be paid over to them together with any interest that may be due thereon.

Article 6

It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.

Article 7

It is agreed that the United States at its own cost, will erect on the Colville Indian Reservation not ceded at some point suitable and convenient to the Indians who may elect to remain upon the portion of the Reservation hereby ceded and have allotments set apart thereon as hereby stipulated, a blacksmith shop and furnish same with suitable tools and implements and employ a competent blacksmith for the benefit of said Indians.

Article 8

And whereas it is believed that many of the Indians above the age of Eighteen years residing and having their homes upon the said Colville Reservation are well advanced in industrial pursuits and economical training and possess habits so well formed as to warrant an early payment to such Indians of their shares in the purchase money of the lands hereby ceded and relinquished, it is therefore specially agreed and stipulated that the United States will pay in two equal annual installments with interest the shares of all such Indians above eighteen years of age in said purchase money who will furnish to The Secretary of the Interior a certificate in due form from the Indian Agent on said Colville Reservation to the effect that such Indian or Indians are of good character, of sober and industrious habits and are suitable persons to entrust with the expenditure of money.

Article 9

It is stipulated and provided that such male adult Indians upon the Colville Reservation as do not on account of absence or for any other cause sign this agreement, shall

upon receiving their shares in said purchase money, execute and file with the Indian Agent on said Colville Reservation a brief relinquishment releasing to the United States all their right, title, interest and estate in and to the lands hereby ceded.

And it is further stipulated that in the event any of said Indians shall after reasonable notice given, fail, neglect, refuse or decline to receive and receipt for their shares in said purchase money, then and in all such cases under such rules and regulations as the Secretary of the Interior may prescribe, the share or shares of such Indians which are not claimed or called for, shall become common property of all Indians in said Reservation who conform to this agreement and they shall share and share alike therein.

Article 10

At the request of said Indians it is agreed and stipulated that the school site referred to in Article 4 of this agreement shall be located upon that portion of the lands hereby ceded which the Indians interested in said school may select. The Saw Mill and Grist Mill referred to in said Article 4 shall be located upon that part of said Reservation not ceded at such point as will be convenient to the Indians electing to remain on the ceded part of Reservation.

Article 11

That in further consideration of the said cession and relinquishment of the tract of land set forth and particularly described in this agreement, to the United States by said Indians and their Chiefs or head-men, and upon the understanding that said Chiefs and their people will faithfully perform this agreement, the United States in addition to

the purchase money aforesaid will pay to Moses Chief of The Columbia Tribe of Indians the sum of One Thousand Five Hundred Dollars in cash, to Joseph Chief of the Nez Perces tribe the sum of One Thousand dollars in cash, to Barnaby Chief of the Colville tribe the sum of one thousand Dollars in cash, to Antoine Chief of the Okanogan tribe the sum of one thousand Dollars in cash, and to Aripaughin Chief of the Lake tribe the sum of one thousand Dollars in cash, from and after the notification and approval of this agreement by Congress at which time the same will go into effect.

Article 12

This agreement shall go into effect from and after its approval by Congress.

Witness our hands and seals the day and year first above written.

MARK A. FULLERTON, *Commissioner*
W. H. H. DUFUR, *Commissioner*
JAMES F. PAYNE, *Commissioner*

Antoine Chief Okanogans his X mark

* * *

[Balance of signatures, approximately 575 individuals, chiefs and sub-chiefs, is deleted.]

* * *

Signed, sealed and delivered in the presence of

HAL J. COLE
S. P. SHMIDT
E. C. THOMAS

I , Robert Flett, U.S. Indian Interpreter, for the Colville Indian Agency do hereby certify, on honor that the foregoing agreement was carefully read and by me correctly

interpreted and that the contents thereof were freely explained to, and fully understood by said Indians before the signing and sealing of the same.

Witness
A. M. ANDERSON /s/ROBERT FLETT

SUPERIOR COURT FOR FERRY COUNTY
(TRIAL COURT)
FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATE OF WASHINGTON, *Plaintiff*, v. ALEXANDER J. ANTOINE, and IRENE F. ANTOINE, his wife, *Defendants.*	No. 4859 Findings of Fact and Conclusions of Law

THIS MATTER, having come on regularly before the undersigned judge, the court having heard the stipulation of counsel concerning the facts of the case, and having listened to oral arguments of MR. LARRY CONIFF, Deputy Attorney General for the State of Washington, and MR. MASON D. MORISSET, general counsel for defendant herein, now makes the following

FINDINGS OF FACT

1. On Setpember 1, 1971, defendant Alexander Antoine, was engaged in the activity of hunting for deer in Ferry County, Washington, within the exterior boundaries of the original Colville Indian Reservation as established by the President of the United States by Executive Order in 1872.

2. On September 11, 1971, defendant, Alexander Antoine, did also have in his possession a game animal, to-wit: a deer.

3. At the time of such hunting and possession, *i.e.*, September 11, 1971, hunting season was closed for deer in this particular area within Ferry County.

4. Defendant, Alexander Antoine, is a duly-enrolled member of the Confederated Tribes of the Colville Reservation.

5. The action herein complained of, *i.e.*, hunting and possession of a deer in closed season, occurred outside the exterior boundary of the Colville Indian Reservation as it presently exists.

6. The land on which the deer was shot was non-trust, unallotted, non-Indian owned land.

7. In 1891 the United States entered into an agreement with the Confederated Tribes of the Colville Reservation, entered in this cause as defendant's Exhibit 4, which contains the following language in Article VI:

> ". . . the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."

FROM THE FOREGOING, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and subject matter of this action.

2. The Colville Indians and defendant herein are bound by the 1891 agreement with the United States Government which gave the Indians the right to hunt and fish in common with all others. This means that defendant is bound by the State conservation laws as all others are bound.

3. Having shot and been in possession of a deer during closed season, defendant is guilty of taking a deer out of season in violation of RCW 77.16.020 and guilty of unlaw-

ful possession of a deer in closed season in violation of RCW 77.16.030.

DONE IN OPEN COURT this 27th day of July, 1972.

/s/ RICHARD J. ENNIS
Judge

Presented by:

PROSECUTING ATTORNEY
FOR FERRY COUNTY
/s/ GRANVILLE EGAN

Copy Received and Approved
for Entry:

ATTORNEY GENERAL OF
STATE OF WASHINGTON
/s/ LARRY CONIFF
Deputy Attorney General

Copy Received and Notice of
Presentation Waived:

ZIONTZ, PIRTLE & MORISSET
/s/ MASON D. MORISSET
Attorneys for Defendants

JUDGMENT OF TRIAL COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF FERRY

STATE OF WASHINGTON, *Plaintiff,* v. ALEXANDER J ANTOINE, and IRENE J. ANTOINE, his wife, *Defendants.*	No. 4859 Judgment and Sentence [Filed 5/18/72]

This matter coming on regularly for hearing before the undersigned on the 14th day of January 1972, the defendants Alexander and Irene Antoine, appearing in person and with their attorney Mason D. Morisset of Ziontz, Pirtle and Morisset of Seattle; the defendants having been charged with violations of RCW 77.16.020; 77.16.030; and RCW 77.16.050, committed 11 September 1971, and were tried in District Court No. 1, Ferry County, Washington, to all of which charges defendants pleaded Not Guilty in this Court after a prior finding of Guilty in the District Court: and Appeal having been made hereto, and Trial having been had in this Court, Witnesses having been sworn and evidence introduced by the State of Washington, and on behalf of the defendants, and argument having been made, and,

It APPEARING this Court found the defendants Guilty of violating RCW 77.16.020 and 77.16.030, and that, on the motion of the State the charge of violating RCW 77.16.050, was dismissed and

It APPEARING that the District Court sentenced Alexander Antoine to 30 days with 25 days suspended, plus one year probation, and the defendant Irene Antoine 30 days, suspended, with one year probation, and

It APPEARING THAT each defendant personally, their attorney, Mason D. Morisset, and the Assistant Attorney General and the Prosecuting Attorney all have stipulated in writing filed in this Court that such sentence of the District Court was reasonable under the particular circumstances, and each would agree that the same sentence be the sentence of the Hon. Richard J. Ennis, the Trial Judge herein, and

It APPEARING that the defendants have waived their right to be present at the signing of the sentence in this case. NOW THEREFORE

It is hereby ORDERED, ADJUDGED and DECREED that the defendants Alexander J. Antoine and Irene F. Antoine is each guilty of violation RCW 77.16.020, (hunting during closed season). it is further

ORDERED, ADJUDGED and DECREED that the defendant Alexander J Antoine shall be confined in the County jail of Ferry County for 30 days, with 25 days thereof suspended, and is placed on probation to this Court for a period of one year from the entry of this Judgment,

It is further ORDERED that the defendant Irene F. Antoine shall be confined in the Ferry County Jail for 30 days, suspended, and shall be placed on probation to this Court for a period of one year from date of the filing of this Judgment.

During the period of their probation each defendant

shall be under the custody of the Sheriff of Ferry County, and shall make such reports and obey such reasonable rules as he shall direct.

Done in open Court this 16th day of May, 1972.

/s/ RICHARD J. ENNIS
Judge

Presented by:
/s/ GRANVILLE EGAN
Prosecuting Attorney for Ferry County

OPINION OF WASHINGTON SUPREME COURT
FILED 7/12/73

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

THE STATE OF WASHINGTON *Respondent,* v. ALEXANDER J. ANTOINE, and IRENE J. ANTOINE, his wife, *Appellants.*	No. 42420 EN BANC Filed July 12, 1973

The appellants were charged in superior court with the offenses of hunting during closed season (RCW 77.16.020) and possession of deer during closed season (RCW 77.16.-030). The offenses occurred on unallotted nonIndian land in what was once the north half of the Colville Indian Reservation. By way of defense, the appellants asserted that they were not subject to the state's game protection laws, immunity from such laws having allegedly been promised them by the United States government under the terms of an agreement signed by agents of the government and by members of their Indian tribe in 1891. The trial court held that the agreement was not intended to afford such immunity from state laws, and entered judgment and sentence, from which this appeal has been taken.

The appellant husband is an enrolled member of the Confederated Tribes of the Colville Reservation, and it is not questioned that he and his wife are beneficiaries of the agreement in question, which was executed when the Indians residing on the reservation, for a stated price, ceded their right of occupancy and use of the northern half of

the reservation to the United States, owner of the fee.[1] Under the terms of the agreement certain lands in the ceded portion were to be allotted to Indians then residing on the northern half. A school and a millsite and buildings were to be provided on the ceded lands.

Article 6 of the agreement stated:

> It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal;[2] that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common

1. The Colville Reservation was created by executive order on July 2, 1872. 1 Kappler 915-916.

> It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

Spalding v. Chandler, 160 U.S. 394, 402, 40 L. Ed. 469, 16 S. Ct. 360 (1896).

2. Const. art. 26, Compact with the United States, provided that the state should impose no taxes on lands or property belonging to the United States, with the proviso:

> That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

> with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.

It is upon the final clause of this article that the appellants place their reliance. It is their theory that, before the northern half of the reservation was ceded under the terms of this agreement, their ancestors had the exclusive, absolute, and unrestricted right to hunt and fish upon the entire reservation, and that it was this right which the agreement was intended to preserve. The appellants do not claim to have succeeded to the interest of an allotment Indian, but it is their assumption that this provision was intended to guarantee to all the Indians on the reservation —and not just to the allotment Indians—the right to hunt on the ceded half. The state does not dispute this interpretation.

We think a plausible argument could be made that this clause, like all the other clauses in this article, was intended to guarantee to the allotment Indians the right to hunt and fish upon the southern half of the reservation, inasmuch as they would no longer be living on the reservation proper and might have their right to hunt there questioned, if it was not clarified in the agreement. Also, since it was contemplated that the unallotted lands in the ceded portion of the reservation would be opened to settlement,[3]

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3. "By the act of July 1, 1892, c. 140, 27 Stat. 62, a specified tract or portion of the reservation—with certain exceptions—was 'vacated and restored to the public domain' and it was provided that this tract should be open to settlement and entry by the proclamation of the President and should be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The exceptions were made by Congress in order to care for the Indians residing on that portion of the reservation." *United States v. Pelican*, 232 U.S. 442, 445, 58 L. Ed. 676, 34 S. Ct. 396 (1914).

and it was reasonably to be foreseen that the settlers might fence their land and exclude the Indians and others from hunting thereon, the allotment Indians might have no place to hunt, outside their individual allotments, unless they could hunt upon the reservation.

However, since the state has not seen fit to adopt or argue this theory and since we also find merit in the theory which the state does advance, we do not rest our decision here upon that possible interpretation of the agreement. It is the state's position that the federal government was not authorized to curtail the states' right to exercise its police power, in this contractual agreement, and that it did not purport to do so.

The appellants, on the other hand, while acknowledging that the instrument in question is in fact a contract and that the executive branch was not authorized to make treaties with the Indians at the time the agreement was entered into,[4] nevertheless insist that the agreement should be given the full force and effect of a treaty—in other words, that it constitutes the supreme law of the land—and further maintain that the plain import of its words is that the right to hunt and fish on the ceded and unallotted lands should never be subject to state regulation.

We cannot agree with the proposition that there is no significant difference between a contract and a treaty. A

4. *See* Act of March 3, 1871, ch. 120, Rev. Stat. § 2079: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

treaty is defined in Black's Law Dictionary (4th rev. ed. 1968), citing *Edye v. Robertson,* 112 U.S. 580, 28 L. Ed. 798, 5 S. Ct. 247 (1884); *Ex parte Oritz,* 100 F. 955 (C.C.D., Minn. 1900); and *Charlton v. Kelly,* 229 U.S. 447, 57 L. Ed. 1274, 33 S. Ct. 945, 46 L.R.A. (n.s.) 397 (1912), as follows:

> An agreement, league or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state.

A treaty must be entered into with the advice and consent of the senate and must be ratified by two-thirds of the senators present. U.S. Const. art. 2, § 2. Once ratified, a treaty becomes the supreme law of the land. U.S. Const. art. 6. A treaty which deals with a matter of national and international concern may contain provisions, binding upon the states, which the Congress, without such treaty, would have no power to enact. *Missouri v. Holland,* 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920). States are forbidden to enter into treaties. U.S. Const. art 1, § 10.

A contract, on the other hand, can be enforced only against those party to it. *McIntyre v. Johnson,* 66 Wash. 567, 120 P. 92 (1912). *See* 17 Am. Jur.2d *Contracts* §§ 1, 15 (1964). A state is bound by contracts executed in its behalf by its duly authorized agents, provided the contract does not contravene the constitution and does not divest the state of its essential attributes of sovereignty or its governmental powers. 81 C.J.S. *States* §§ 112-13 (1953). 49 Am. Jur. *States, Territories, and Dependencies* § 62 (1943). But before a contract liability can be imposed

upon a state, there must be a contractual obligation on its part.

The United States, as a body politic, and as an incident of its sovereignty, may enter into contracts, express or implied, appropriate to the just exercise of its constitutional powers, if not prohibited by law, even though there is no special statute authorizing the government to contract. 91 C.J.S. *United States* §§ 81-82 (1955).

There is no argument by the state that the contract between the United States and the Indians of the Confederated Tribes was made without authority. The appellants, on the other hand, do not suggest that the state was a party to the contract or that the agents of the federal government who negotiated and signed the contract were authorized to act on behalf of the state.

Did the parties nevertheless intend that the state should be considered a party to this agreement?

Looking to the terms of the agreement, we find that the promises made by the federal government, setting aside for the moment the clause relating to hunting and fishing rights, were all undertakings which it was within the power of the federal government to perform. These included the payment of a stated sum for the ceded land, the allotment of certain lands to the Indians living on the north half of the reservation, the setting aside of sites and the building and maintenance of schools and other structures on the ceded land, the guarantee of water rights on the allotted land, and the exemption from taxation of the allotted land "within the limitations prescribed by law."

The latter provision is the only one in the agreement

which makes any reference to state or local government, and the provision itself is in harmony with article 26 of the constitution of the state of Washington. In making this promise, then, the United States did not purport to invade any reserved power of the state but merely set forth in the agreement a right which was already guaranteed under the state constitution.

Thus, nowhere in the agreement did the federal government purport to act on behalf of the state of Washington or to cede any of its jurisdiction. The state itself could not have lawfully made such a cession had it been a party to the agreement. Yet the appellants earnestly contend that the court must read into the language promising the continuation of hunting and fishing rights a promise that the state of Washington would not exercise its right, under the police power, to regulate hunting upon those ceded lands which were to become a part of the public domain.

It was implicitly recognized by the United States Supreme Court in *United States v. Pelican*, 232 U.S. 442, 58 L. Ed. 676, 34 S. Ct. 396 (1914), the lands within the public domain which are not subject to the exclusive jurisdiction of the feleral government are subject to the jurisdiction of the state. In that case, the defendant charged with a crime under federal law, took the position that he was not subject to federal jurisdiction because the crime was not committed on the Colville reservation but rather was committed on allotted lands located outside the diminished reservation.

In holding that the allotted lands were Indian country and therefore subject to federal jurisdiction, the Supreme Court took cognizance of the fact that Congress in the act

of July 1, 1892, c. 140, 27 Stat. 62, vacated and restored to the public domain a certain portion of the reservation (that portion upon which the offenses charged in this action occurred), to be disposed of under the general laws applicable to the disposition of public lands in the state of Washington.[5] The court also recognized that upon the expiration of the trust period, the allottees were, according to the terms of the act of Congress, to become subject to and to have the benefit of the laws, both civil and criminal, of the state.[6]

It is evident that Congress was aware that the ceded and unallotted lands when opened for settlement, if not before, would come under the jurisdiction of the state. In fact, the appellants do not question the state's power to regulate

5. *See also State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 356 P.2d 985 (1960). Another situation involving the question of federal jurisdiction was before the court in *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276 (1936), where we held that the federal government can secure exclusive jurisdiction over lands purchased within a state only if the state cedes such jurisdiction pursuant to article 1, section 8 of the constitution of the United States, providing that such jurisdiction can be ceded if the land is to be used for certain enumerated purposes. Lands set aside by the federal government for Indian reservations, either through treaty or by executive order, are also under the jurisdiction of the United States by reason of the power of the federal government to regulate Indian affairs. *See* 41 Am. Jur.2d *Indians* § 50 (1968). That power appears not to have been granted by any express provision of the constitution, but has never been denied.

6. *See Matter of Heff*, 197 U.S. 488, 509, 49 L. Ed. 848, 25 S. Ct. 506 (1905), where the court said: "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject of the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

the taking of game on the land in question; they claim only to be exempt from the operation of the game laws by virtue of the terms of the agreement of 1891. It is their theory that the rights promised them under the agreement must include immunity from state regulation, else they were promised nothing which they would not have had without the agreement.

As stated before, the appellants assert that, before the cession of the northern half of the reservation, they had the exclusive right to hunt thereon, unconstrained by state game regulations, and that it was the intent of the agreement to preserve this right on the ceded land. They acknowledge that the hunting rights on the reservation were subject to federal regulation at the time of the treaty and declare that they are subject to such regulation off the reservation, although they cite no legal authority for this proposition.[7]

Counsel also conceded in oral argument that the present owners of land in the northern half of the reservation have the right to fence their land and exclude hunters. Nevertheless they maintain that state regulation of the right to hunt is an abridgment of that right, within the meaning of the language as it was used in the contract.

According to the appellants' theory, then, the party who

7. *See* 35 Am. Jur. 2d *Fish & Game* § 32 (1967), stating the general rule to be that the federal government has no power, aside from the power to enact statutes to carry out treaties respecting migratory birds (*Missouri v. Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920)), to prescribe regulations for the protection of fish and game while within the boundaries of a state. In *Hunt v. United States*, 278 U.S. 96, 73 L. Ed. 200, 49 S. Ct. 38 (1928), however, it was held that the United States might exercise the proprietary right, on its own property, to kill game out of season for the purpose of protecting its game reserve.

executed the contract—the United States—has the right to abridge their hunting rights by regulating them, and its successors in interest have a right to abridge them by excluding hunters from their land; but the state, which was not a party to the agreement and authorized no promise to be made on its behalf, cannot exercise its power and duty to protect its game, because that would amount to an unauthorized abridgment.

We think that if it was contemplated that regulation of hunting rights would constitute an abridgment of those rights, the federal government would have agreed to exempt the Indians' rights from regulation. But it is not contended that it did so either expressly or impliedly. On the other hand, if it was thought that state regulation but not federal regulation would constitute an abridgment, an express provision to that effect should have been inserted, but only after the consent of the state had been sought and obtained.

Since the parties admittedly contemplated that the Indians' hunting rights would remain subject to regulation, it follows that regulation is not ipso facto an abridgment. We think the reasonable understanding of the parties must have been that the United States, as proprietor of the land, would not abridge the Indians' hunting and fishing rights.

Taking into account the fact that the federal government had no authority to and did not purport to act on behalf of the state or to commit it to release a portion of its sovereign powers, and the additional fact that all other provisions of the agreement were of the kind which were appropriate to such an agreement and within the power of the parties to perform, we are led to conclude that the

parties intended their contract to embrace only matters which were within their control.

Whether the intent was to guarantee to the allotment Indians the right to hunt on other ceded lands as long as the white man and other Indians were allowed to hunt there, and on the southern half of the reservation with their fellow Indians—a promise which the parties could fulfill—or whether it was the intent to guarantee to all the Indians of the tribe the right to hunt upon the unallotted lands in the ceded half, we think the language "in common with all other persons" was not without significance. It was known that the government intended to open these lands to settlement, that this was its purpose in acquiring them. This meant that proprietary rights would be exercised, that the lands might be fenced and hunters excluded. Under these circumstances, it was a reasonable undertaking for the purchaser of the land to agree to see to it that, as long as it held the land and allowed others to hunt thereon, the members of the tribe also should be allowed to hunt there.

The theory that the language of this agreement was intended to preserve the hunting and fishing rights intact, just as they had existed prior to the cession of the lands, cannot be reconciled with the fact of cession of all the Indians' "rights, titles, claim and interest" in the lands and the appellants do not contend that the language was meant to limit those words of cession. Such an interpretation would place a heavy encumbrance upon the title of every settler or purchaser.

Significantly, we find in the statutes authorizing the allotment of lands (act of Feb. 8, 1887, ch. 119, 24 Stat. 388), appropriating money for the purchase of the Indians' rights

(act of June 21, 1906, Pub. L. No. 59-258, ch. 3504, 34 Stat. 325), and opening the unallotted land for settlement (act of July 1, 1892, ch. 140, 27 Stat. 62), no reference to the reservation of hunting and fishing rights. Other provisions of the agreement can be found reflected in these statutes, but upon the question of hunting and fishing, the statutes are silent.

Are we to assume that, by omitting these provisions from the enabling statutes, the United States Congress intended to disregard a contractual undertaking on the part of its duly authorized commissioners? Research reveals no clue to the omission, but we assume that the government of the United States acted in good faith and that, according to its understanding of the import of the terms, they were not intended to encumber the titles of settlers and purchasers or to impose restrictions upon the exercise of the police power by the state. Rather, we assume, it was thought that the undertaking on the part of the government was that of a proprietor and that the agreement could be performed within the normal functioning of the executive department.

There is expressed in these statutes an intent that the settlers and purchasers of the unallotted lands should take the title to the land unencumbered by restrictions in favor of those who had formerly enjoyed the right to occupy and use the land. They also manifest an intent that the Indians to whom land was allotted should receive their patents in due course and become citizens of the state, subject to all of its laws and entitled to receive their benefits. It is not in harmony with this expressed intent to assume that the Congress intended at the same time to grant to those

Indians and to the Indians remaining on the reservation an immunity from the state's game regulation laws, assuming that it was within its power to grant such immunity. Such an intent cannot be found, either express or implied, in the statutes and it is not manifested in the agreement.

We are of the opinion that the trial court correctly construed the agreement of 1891, and that it was not the intent to guarantee to the Indians immunity from the laws of the state when hunting off the reservation.

We have no quarrel with the appellants' authorities, interpreting and giving force to Indian treaties. Such treaties are binding upon the states under the supremacy clause. U.S. Const. art. 6. As the United States Supreme Court said in *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905), a state takes jurisdiction over its territory, when it is admitted to statehood, subject to the provisions of treaties adopted for purposes appropriate to the objects for which the United States held the territory prior to statehood. The agreement before us in this case is not a treaty and it was not signed before statehood. It is not the supreme law of the land. The statutes enacted by Congress in implementation of this agreement, which are the supreme law if they are within the power of the Congress to enact, make no reference to the provision relied upon by the appellants.

Even though it is bound by the provisions of a treaty, a state is not denied the right to enforce against the Indians its reasonable regulations for the preservation of fish. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968). It would be anomalous indeed if the court were to hold that the state can be

deprived of its power to regulate the taking of game through the execution of a contract to which it was not a party, but could not be so deprived by the execution of a treaty admittedly within the power of the federal government to sign, which is declared by the constitution to be the supreme law of the land. We do not, however, reach the question whether this can be done by contract, since it is our conclusion that it was not intended to be done in this case.

Our view of the proper interpretation of this agreement is in harmony with the principles which have guided the courts in deciding questions which involve an alleged conflict between the exercise of federal and state powers. The United States Supreme Court said in *South Carolina v. United States,* 199 U.S. 437, 448, 50 L. Ed. 261, 26 S. Ct. 110 (1905):

> We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty.

This principle was recognized by the Supreme Court in *Dick v. United States,* 208 U.S. 340, 52 L. Ed. 520, 28 S. Ct. 399 (1908), a case strongly relied upon by the appellants. There, the defendant was prosecuted under the federal laws prohibiting the introduction of intoxicating liquor

into Indian country. The violation occurred on land which had been ceded by the Nez Perce Indians to the United States. Under the terms of the agreement, the lands ceded and allotted were to remain subject to the protection of the federal laws prohibiting the introduction of liquor into the Indian country. The court upheld the agreement.

Insofar as the opinion in that case reveals, the state of Idaho was not a party to the action. It was not contended that the federal laws were in conflict with or superseded state laws; rather the defense was that the federal government did not have jurisdiction over this offense, because exclusive jurisdiction resided in the state. The court held, in the exercise of its constitutional power to regulate commerce with the Indians, the federal government might enforce an agreement of this kind for a reasonable period of time—in that case, 25 years. The court said:

> In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a State, upon its admission into the Union, is thereafter upon an equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own constitution. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian tribes Congress must have regard to the general authority which the State has over all persons and things within its jurisdiction. So, the authority of the State cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes.

208 U.S. at 353.

Inasmuch as no conflict between the agreement and existing state law was found in that case, the court found it possible to give effect to the agreement without infringing upon the jurisdiction of the state. The case differs from this in several important aspects. In the first place the question before the court was not one of interpretation, the language of the agreement being unambiguous and the only question being, was it enforceable? The state was not a party to the action and did not claim that enforcement of the agreement would interfere with the exercise of its police power. Further, the agreement was made in the exercise of a constitutional power of the federal government—that of regulating commerce with the Indian tribes. That the hunting of game is not commerce has been long settled. *Geer v. Connecticut,* 161 U.S. 519, 40 L. Ed. 793, 16 S. Ct. 600 (1896). Another significant difference is that the duration of the agreement in that case was only 25 years, whereas here the agreement is not limited as to time. The reasonableness of the period of time covered by the agreement, as well as the absence of any conflict with state laws, were factors to which the court appears to have given substantial weight in sustaining it.

The statement of the court in *Dick* which is applicable here is that which is found in the quoted paragraph—that in performing their proper functions, each of the two governments, federal and state, must have regard to the proper functioning and jurisdiction of the other and that neither of these must be allowed to nullify the other.

It is a fundamental principle of which the court was undoubtedly aware in the *Dick* case, that the power of a state

to govern man and things will not be lightly stricken down by implication, and an unexpressed purpose of Congress to set aside statutes of states regulating their internal affairs is not lightly to be inferred and ought not to be applied where the legislative command, read in the light of its history, remains ambiguous. The intention of Congress to exclude the states from exercising their reserved powers must be clearly manifested. If it is claimed that a federal act conflicts with a state act, it must be clear that the federal provisions are inconsistent with those of the state in order to justify the thwarting of state regulation. *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 82 L. Ed. 3, 58 S. Ct. 87 (1937); *California v. Zook* 336 U.S. 725, 93 L. Ed. 1005, 69 S. Ct. 841 (1949); 81 C.J.S. *States* § 7, pp. 886-87 (1953).

This rule applies, of course, where both the federal and state governments are acting within their proper jurisdiction and it applies to acts of Congress, the supreme law of the land. If these are the governing principles when the court is viewing laws of such dignity, they are all the more forceful where the court is asked to hold that the federal government, in a contract to which the state was not a party and to which it did not give its consent, has undertaken to bind the state to renounce one of the powers which it is bound to exercise for the common welfare.

We are convinced that our interpretation of the agreement of 1891 gives full effect to the proper objectives and intentions of the parties, while preserving to the state the right to exercise its police power in an area properly within its jurisdiction.

The judgment is affirmed.

We concur:

HALE, C. J.

/s/ ROSSELLINI, J.

FINLEY, J.

STAFFORD, J.

HAMILTON, J.

BRACHTENBACH, J.

No. 42420

UTTER, J. (concurring in part)—I concur in that portion of the opinion which construes article 6 to guarantee allotment Indians the right to hunt and fish upon the southern half of the reservation.

/s/ UTTER, J.

I Concur

WRIGHT, J.

Remittitur of Washington Supreme Court to Trial Court

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,* v. ALEXANDER J. ANTOINE, and IRENE J. ANTOINE, his wife, *Appellants.*	REMITTITUR No. 42420 Ferry County No. 4859

The State of Washington to: The Superior Court of the State of Washington in and for Ferry County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 12, 1973, became the final judgment of this court in the above entitled case on August 13, 1973. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

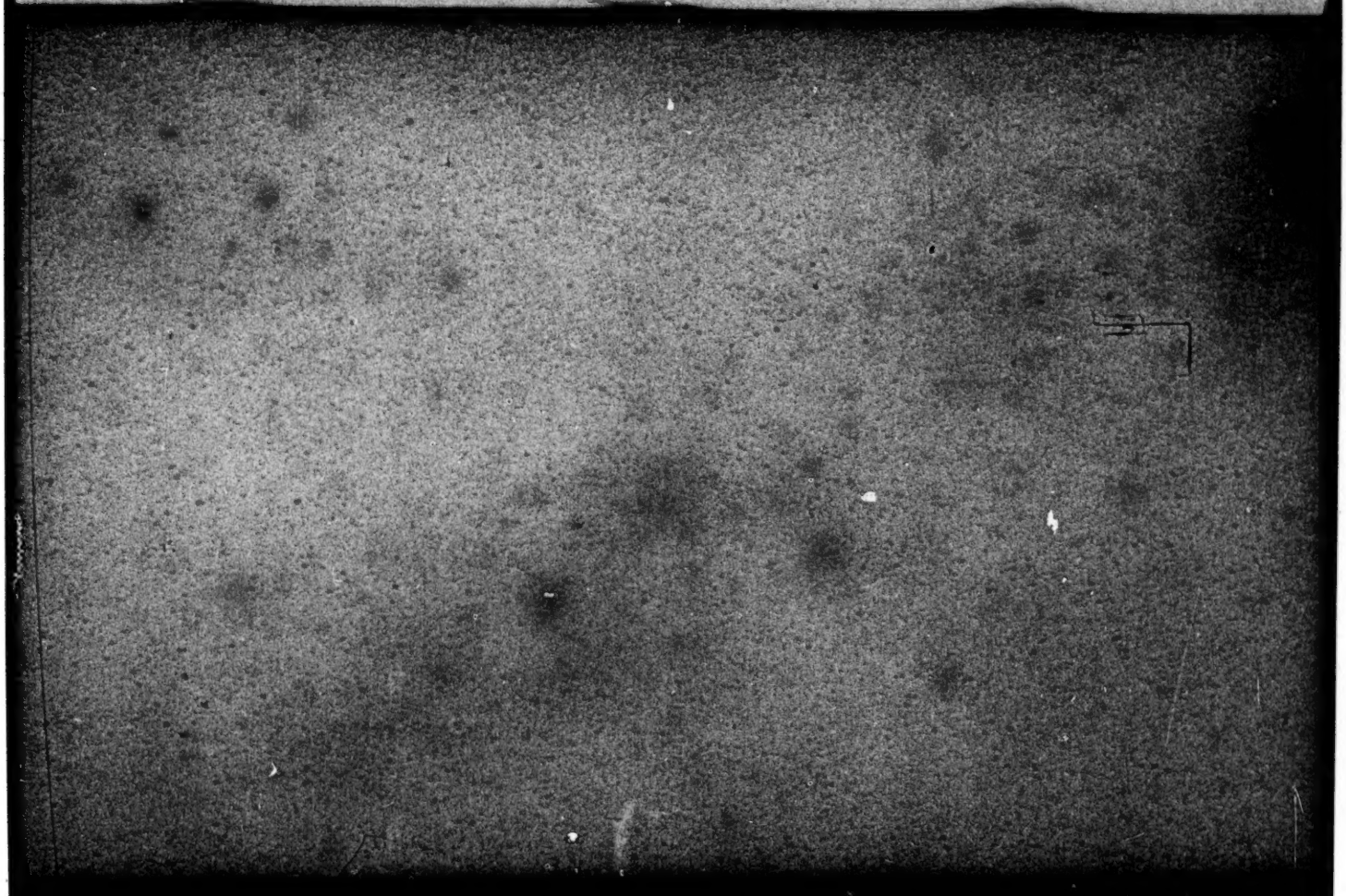
Pursuant to Rule 55 on Appeal, costs are taxed as follows: No cost bill having been filed, costs are deemed waived.

cc. MR. MASON D. MORISSET
HONORABLE GRANVILLE EGAN
Reports Office

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of August, A.D. 1973.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington

[SEAL]



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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-717

ALEXANDER J. ANTOINE and IRENE F. ANTOINE, his wife,
Appellants,
v.
THE STATE OF WASHINGTON,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

ZIONTZ, PIRTLE, MORISSET
& ERNSTOFF
By MASON D. MORISSET
Attorneys for Appellants

Office and Post Office Address:
3101 Seattle-First National
Bank Building
Seattle, Washington 98154
Telephone (206) 623-1255

October, 1973

CRAFTSMAN & NET PRESS SEATTLE, WASHINGTON

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IN THE

Supreme Court of the United States

October Term, 1973

No. .....

ALEXANDER J. ANTOINE and IRENE F. ANTOINE, his wife,
Appellants,

v.

THE STATE OF WASHINGTON,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

Appellants, who are Indians,[1] were convicted of violating game laws of the State of Washington. They appeal from the Judgment of the Supreme Court of the State of Washington, entered July 12, 1973, confirming the judgment of conviction in the Superior Court for Ferry County, State of Washington, Cause No. 4859, signed and entered by the Honorable Richard J. Ennis on May 16, 1972, and filed May 18, 1972.

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported at 82 Wn.2d 440, ... P.2d ..... (1973), and is

1. Appellant Alex Antoine is an enrolled member of the Confederated Tribes of the Colville Indian Reservation. His wife, Irene is a member of the Canadian branch of the Okanogan Band and is not enrolled in the United States.

reprinted as Appendix A. The Superior Court's findings, judgment and sentence are not reported, but are reprinted as Appendices B and C. The judgment appealed from (being the Remittitur of the State Supreme Court dated August 12, 1973) is reprinted as Appendix D.

JURISDICTION

Alexander Antoine, a Colville Indian, shot a deer on land which was formerly part of the Colville Indian Reservation. Mr. Antoine and his wife Irene were charged with violation of state laws which prohibit taking and possession of deer during closed seasons.

They were tried, convicted and sentenced to jail terms. A timely appeal was taken to the State Supreme Court. On July 12, 1973, that court affirmed and expanded the decision of the trial court by rendering a written opinion upholding the lower court's decision.[2]

On August 12, 1973, the Washington Court issued its Remittitur[3] to the trial court, which is the judgment enforcing its written opinion.[4]

On September 19, 1973, appellants filed in the Washington Supreme Court, a notice of appeal to the Supreme Court of the United States.[5]

Jurisdiction of the Supreme Court to review the judgment below by direct appeal is conferred by 28 U.S.C. § 1257(2) which reads in part:

2. App. A.
3. App. D
4. RCW 2.04.170, Supreme Court Administrative Rules, Rule 15.
5. App. E.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Metlakatla v. Egan*, 369 U.S. 45 (1962);[6] *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942).

STATUTES AND FEDERAL LAWS INVOLVED

United States Constitution, Article VI, clause 2 (Supremacy Clause).[7]

United States Constitution, Article I, section 8, clause 3 (Indian Commerce Clause).[8]

25 U.S.C. § 2.[9]

Agreement of 1891.[10]

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6. *Metlakatla* is analogous to the present case. There, the Indians claimed that they were immune from state wildlife laws as applied to them on the grounds that such laws were repugnant to the Supremacy Clause, federal statutes and secretarial orders. Here, appellants allege that state law is repugnant to the Supremacy Clause, federal statutes and executive orders. *Metlakatla* held that appeal was the appropriate remedy. *Metlakatla, supra*, p. 50.

7. App. G., p. G-1.

8. App. G., p. G-1.

9. App. G., p. G-2.

10. App. F. National Archives Document No. 21167—Indian Office Inclos. No. 8-1891.

Act of June 21, 1906, 34 Stat. 325, at 377 (3 Kapp. 193, at 245).[11]

Executive Order of July 2, 1872 (1 Kapp. 195).[12]

Revised Code of Washington, Section 77.16.020[13] and Section 77.16.030.[14]

QUESTIONS PRESENTED

1. Where an Indian tribe cedes lands of its reservation to the United States by agreement, may the federal government reserve hunting rights for the Tribe in the ceded area?

2. When former Indian lands become part of a state, does the state take the land subject to rights previously reserved on such lands for Indians by the United States?

3. Did the federal government by the agreement of 1891 and the act of June 21, 1906, reserve hunting rights to the Colville Indians on their former reservation?

4. Where the United States has declared that hunting rights of the Colville Indians "in common with all other persons . . . shall not be taken away or in any wise abridged," may the State of Washington abridge, impair or regulate such rights?[15]

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11. App. G., p. G-1.
12. App. G., p. G-1.
13. App. G., p. G-2.
14. App. G., p. G-3.
15. Within these general questions, are, of course, many subsidiary questions which deal with the specifics of the case: *e.g.*, are sections 020 and 030 of Chapter 77.16, Revised, repugnant to the Executive Order, 1891 Agreement, and statute of 1906 involved in the case? What are the proper rules of interpretation, intent and construction to be applied to post-1871 federal actions, be they executive orders, agreements, statutes, secretarial orders, etc.? Did the end of the power to make treaties with Indians in 1871 limit the federal government's power and authority in dealing with its Indian wards thereafter?

STATEMENT OF THE CASE

The Colville Confederated Tribes comprise eleven separate tribes and bands of Indians who formerly occupied large areas of Eastern Washington. They were placed on the Colville Indian Reservation in 1872 by Executive Order of the President.[16] The tribes are recognized by the United States Government, Bureau of Indian Affairs and are governed by a Constitution and By-Laws approved by the Secretary of the Interior on December 26, 1938. Of the 5,340 enrolled members of the tribes, approximately half live on the Colville Indian Reservation or its environs. Alexander Antoine is an enrolled member of the Tribes.[17]

On September 11, 1971, Mr. Antoine and his wife, Irene,[18] shot and killed a deer in what is now Ferry County, Washington. On that date, the hunting season for deer in that particular area was closed.[19] The area in which the deer was shot, however, was within the boundaries of the original Colville Indian Reservation as established by the 1872 Executive Order.[20]

This land had been ceded back to the United States Government by the various bands and tribes of the Colville Confederation by agreement with the United States in 1891.[21] That agreement provided in part:

> It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limita-

16. Executive Order of July 2, 1872; (1 Kapp. 195), App. G., p. G-1.

17. R. 51.

18. Irene Antoine is also an Indian, but not an enrolled member of the Confederated Tribes.

19. R. 50.

20. R. 50.

21. App. F.

> tions prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the *right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.*[22]

Mr. Antoine and his wife were cited by a State of Washington game protector for shooting and possessing deer in violation of the Washington State game laws.[23]

They were tried in Ferry County District Court in October 18, 1971 and found guilty as charged in an opinion filed by the District Court Judge on November 1, 1971.[24]

Pursuant to state law, Alex Antoine and his wife filed a timely Notice of Appeal to the Superior Court for trial *de novo*.[25]

Trial was held January 14, 1973 before the Honorable Richard J. Ennis, resident judge of the judicial district composed of Lincoln County, State of Washington, sitting *pro tem* for the Ferry County Superior Court, Republic, Washington.[26]

After trial on stipulated facts,[27] appellants' conviction for hunting and possession of deer out of season was upheld by the Superior Court, holding that:

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22. App. F., p. F-4.

23. RCW 77.16.020 and 77.16.030. See App. G herein.

24. District courts are county courts of limited jurisdiction in the State of Washington. See RCW 3.66.060.

25. Superior courts are state courts of general jurisdiction (RCW 2.08-.020) to which appeals from districts courts may be made.

26. R. 5.

27. R. 7-9.

> These Indians are bound by the 1891 Agreement which gave the Indians the right to hunt and fish in common with all others. Now, this simply means that the defendant is bound by the state conservation laws as all others are bound.[28]

Judgment and sentence were filed May 19, 1972, finding Mr. Antoine guilty as charged, sentencing him to 30 days, 25 suspended, and his wife, Irene, to 30 days suspended, with one year probation.[29]

Appeal was taken to the Supreme Court of the State of Washington which rendered its Opinion on July 12, 1973, the Court holding that "the Agreement before us . . . is not the supreme law of the land.[30] and ". . . the federal government was not authorized to curtail the state's right to exercise its police power, . . ."[31]

The Remittitur of the State Supreme Court was filed August 12, 1973, and is hereby appealed from.[32]

HOW THE FEDERAL QUESTION WAS PRESENTED

Superior Court Trial

At all times in this proceeding, appellants have maintained that the state game laws as applied to them were repugnant to federal law. Thus at trial, appellants maintained that they were hunting within the limits of the agreement with the federal government.[33] In appellants' trial brief it was noted that hunting and fishing rights had been reserved and secured by establishment of the reserva-

28. R. 24-25.
29. R. 53-54.
30. 82 Wn.2d 440, at 451. App. A., p. A-13.
31. *Op. cit.*, at 443. App. A., p. A-4
32. App. D.
33. R. 24.

tion and that such rights had not been impaired or abrogated by any subsequent agreements or events.[34]

At the close of trial, the trial judge stated that the Indians were bound by the 1891 agreement but that it only meant that they were bound by all state conservation laws ". . . as all others are bound."[35]

This conclusion was reiterated in the court's formal Findings of Fact and Conclusions of Law, which stated:

> The Colville Indians and defendant herein are bound by the 1891 agreement with the United States Government which gave the Indians the right to hunt and fish in common with all others. This means that defendant is bound by the state conservation laws as all others are bound.[36]

The court then held that defendants were guilty of violating state game laws.[37]

Appellants' Brief to the Washington Supreme Court

On appeal to the Washington State Supreme Court, through assignments of error in the brief,[38] and in written and oral argument, appellants renewed their position that the arrest and judgment violated their federally protected rights.

Appellants argued that hunting and fishing rights originally reserved by the 1872 executive order had not been abrogated by agreement, statute or act of Congress nor were they abrogated by the 1891 agreement or acts ratify-

34. R. 41-45.
35. R. 25.
36. R. 51.
37. R. 52.
38. R. 57, Br. of Appellants, p. 5-6.

ing that agreement.[39] Appellants further argued that Indian rights guaranteed by the federal government were not to be impaired or abrogated by implication,[40] that federal action with regard to Indians were part of the supreme law of the land,[41] and that the Agreement of 1891 was to be construed liberally in favor of the Indians.[42]

In their reply brief, appellants renewed their position that federal jurisdiction over Indian affairs was exclusive and precluded any notion of residual state power.[43] Appellants further argued that once vested, hunting and fishing rights could not be terminated by implication but only by specific and explicit action of the Congress,[44] and that the terms and conditions upon which Indians would surrender and cede land to the federal government was a matter to be determined primarily between the Indians and the United States Government under whose exclusive jurisdiction the Indians were at the time of the cession.[45]

The Opinion of the Washington Supreme Court

The Washington Supreme Court rejected all of the above contentions. It embraced the state's position that the federal government was ". . . not authorized to curtail the state's right to exercise its police power, . . ."[46] It held that there was ". . . merit in the theory which the state does

39. R. 57, Br. of Appellants, p. 11-16.
40. R. 57, Br. of Appellants, p. 16.
41. R. 57, Br. of Appellants, p. 17.
42. R. 57, Br. of Appellants, p. 16-17.
43. R. 59, Reply Br. of Appellants, p. 2 and 4.
44. R. 59, Reply Br. of Appellants, p. 3-4.
45. R. 59, Reply Br. of Appellants, p. 6.
46. App. A, p. A-4.

advance . . .",[47] that the federal government ". . . had no authority to and did not purport to act on behalf of the state or to commit it to release a portion of its sovereign powers . . .",[48] and that acts of the federal government could not "nullify" the "functioning and jurisdiction" of the state.[49] It further held that the state was not a party to the 1891 agreement and thus its powers were not affected thereby.[50]

The court also found that the words "in common with" were "not without significance"[51] and from this implied that no special rights were guaranteed to the Indians.

The court then specifically held that no special hunting and fishing rights were secured to the Indians by the 1891 agreement or Act of June 21, 1906.

> Such an intent (to secure special hunting and fishing rights) cannot be found, either expressed or implied, in the statutes and is not manifested in the agreement.[52]
>
> . . . it was not the intent to guarantee to the Indians immunity from the laws of the state when hunting off the reservation.[53]

Finally the court held that the agreement preserves ". . . to the state direct exercise of its police power in an area properly within its jurisdiction."[54]

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47. App. A, p. A-4.
48. App. A, p. A-10.
49. App. A, p. A-16.
50. App. A, p. A-6-7 This of course constitutes a finding that no special rights were reserved by the Indians.
51. App. A, p. A-11.
52. App. A, p. A-12.
53. App. A, p. A-12.
54. App. A, p. A-17.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This case is of importance not only to appellants but to the 500 or more Colville families who live on or near the reservation, many of whom depend upon game for a food source. The State Supreme Court's decision destroys vested hunting rights on former reservation lands of these Indians. It throws a cloud on the legality of one of the agreed on terms of the 1891 Cession Agreement and thus the entire legality of the Cession itself.

The principles announced by the court have great significance in the continuing federal-state relationship affecting Indian affairs in the state of Washington. If allowed to stand, they will seriously affect the ability of the federal government to carry out its trust responsibility with regard to its Indian wards in the state.[55]

The principle announced by the state court relegates all federal actions, be they Executive orders, agreements, statutes, etc., undertaken after the end of the treaty-making power in 1871, to a second class position in the field of Indian law. The principles enunciated allow the state court to construe and interpret such federal law according to rules and guidelines not heretofore applicable to Indian statutes and agreements.

Those rules and guidelines seriously erode the protection of Indian rights under federal law.

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55. Virtually every one of the 30-plus tribes and bands in the state of Washington trace their current rights and guarantees to post-1871 federal actions or agreements. For example, the Makah Indian Reservation was established by Executive order in 1872, 1 Kapp. 917; the Lummi Indian Reservation was established by Executive Order in 1872, 1 Kapp. 917; the Moses Band of Indians and some of the Colville Bands relinquished their previous reservation by agreement in 1883. (23 Stat. 79).

This conclusion can be best illustrated by a summary of appellants' case followed by the state court's response thereto.

Appellants' case was as follows.

1. *Establishment of an Indian reservation vests hunting rights in an Indian tribe.*

It has long been the rule that rights granted or reserved to Indians by the establishment of a reservation by Executive order are as secure and as entitled to paramount protection as are rights reserved by treaty. *Spalding v. Chandler,* 160 U.S. 394 (1896), and *Federal Indian Law,* p. 614-616.[56]

The instrument establishing the reservation need not specifically enumerate hunting rights for such rights to exist. Where no specific mention of the right to hunt and fish was made, ". . . such a reservation was not necessary to preserve the right on land reserved or retained in Indian ownership. The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, . . . remains in them unless granted away." *Federal Indian Law,* 496-498, citing Op. Act. Sol. M.28107, June 30, 1936. Thus it has been held that where land is merely set aside for Indian use and occupancy, there being no specific mention of hunting and fishing rights, those rights nevertheless are included in the reservation. *Menominee v. United States,* 391 U.S. 404 (1967).

56. *Federal Indian Law,* 1958, is a revision of the *Handbook of Federal Indian Law,* prepared by the office of the United States Solicitor under the editorial direction of Felix S. Cohen, Assistant Solicitor, and first printed in 1940. References in this brief are to the 1966 reprinting by the Association on American Indian Affairs, Inc. of the 1958 revision of the *Handbook.*

Thus it is clear that establishment of the Colville Reservation by the Executive Order of 1872 vested hunting rights in the Colville Confederated Tribes.

2. *A state has no authority over hunting rights on an Indian reservation.*

The nature and scope of the Indian rights to wildlife on a reservation is nearly absolute *vis-a-vis* the state. A state has no authority to interfere with hunting on federal lands. *Hunt v. United States,* 178 U.S. 96 (1928). Wildlife on a reservation belongs to the Indians as their property. *Mason v. Sams,* 5 F.2d 255 (W.D. Wash., 1955); *Pioneer Packing v. Winslow,* 159 Wash. 655 (1930). Within a reservation, Indians are exempt from state conservation regulations. *Moore v. United States,* 157 F.2d 760 (9th Cir., 1956), *cert. denied,* 308 U.S. 827 (1957). And, of course, it is a federal crime to hunt on Indian lands without permission of the Indian owners. 18 U.S.C. § 1165.

Clearly, establishment of the Colville Reservation vested substantial and far-reaching hunting rights in the Colville Indians, over which the State of Washington had no control or authority.[57]

3. *Vested hunting and fishing rights continue until and unless explicitly abrogated by the Congress.*

Hunting rights vested by the establishment of a reservation are not to be lightly terminated. Such rights continue

57. At the time that the rights vested, *i.e.*, 1872, Washington was not yet a state. However the subsequent fact of statehood does not change the authority or control of the state. A state must accept statehood subject to whatever outstanding rights and guarantees exist at the time of statehood. See *United States v. Winans,* 198 U.S. 371, at 382-84 (1905), see also, *Coyle v. Smith,* 321 U.S. 559, 570 (1911) and *Johnson v. Geralds,* 234 U.S. 422, 438-40 (1914); *Metlakatla v. Egan,* 369 U.S. 45, 59 (1962).

even after the termination of the reservation where no specific mention is made of the rights in the article of termination. *Menominee v. United States, supra.*[58]

More generally, the court has rejected attempts to find vested Indian rights terminated by implication. *Choate v. Trapp*, 224 U.S. 665 (1912); *Mattz v. Arnett*, ... U.S. ...., 37 L. Ed. 2d 92 (1973).

4. *Colville hunting rights were preserved by the Agreement of 1891 and the Act of June 21, 1906.*

Applying well-known Indian law principles, it is clear that the hunting rights vested in the tribe were preserved by the Agreement of 1891 and the Act of June 21, 1906.

These principles are as follows:

a. *Federal laws relating to Indians are superior to and supreme with regard to state law.*[59]

The Washington court itself has noted that:

> The historical circumstances, which made exclusive federal jurisdiction over Indians necessary, preclude any notion of residual state powers.

State ex rel. Adams v. Superior Court, 57 Wn.2d 181, 183 (1960).

And this court has held that:

> The whole intercourse between the United States and this (Indian) nation is, by our Constitution and laws, vested in the government of the United States.

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58. It has even been held that in some circumstances the Congress cannot terminate vested rights at all, at least not without adequate compensation. *Choate v. Trapp*, 224 U.S. 665 (1912).

59. U.S. Const., art. 6, cl. 2 (Supremacy Clause) and art. 1, § 8, cl. 3 (Indian Commerce Clause).

Worcester v. State of Georgia, 6 Pet. 515 (1832).[60] Federal power over Indians is so extensive that ". . . one is justified in characterizing such federal power as plenary." *Federal Indian Law*, 24.

b. *Indian agreements, treaties, statutes and laws are to be liberally construed to protect the rights of Indians with all ambiguities resolved in the Indians' favor.*

This has been a primary rule of construction for courts when dealing with Indian rights. *Winters v. United States*, 107 U.S. 564 (1907). See also, *Alaska Pacific Fisheries v. United States*, 248 U.S. 278 (1918).

This court has held that:

> The parties were not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the laws.

Choctaw Nation v. United States, 119 U.S. 1, 28 (1896).

Had the State Supreme Court followed the principles outlined above, only one conclusion would have been possible: the federal government and the Indians intended that vested hunting rights were to be preserved by the agreement of cession and this preservation was to be binding on the State of Washington.

The existence of the rights not being in question, the only issue for the court to decide was whether *any* state

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60. See also, *Williams v. Lee*, 358 U.S. 218 (1959). The general powers of the federal government over Indians have also been noted to derive from the Indian Commerce Clause and from the necessity of giving uniform protection to dependent people. See *Perrin v. United States*, 232 U.S. 478; *United States v. Kagama*, 118 U.S. 275; *Williams v. Lee*, *supra*, at 219, FN 4.

regulation or interference *at all* was allowed or whether some regulation as "necessary for conservation" was possible.[61] To decide that, the court would have had to construe the phrase "in common with," which had been held by the trial court to mean that the Indians were bound by the conservation laws the same as all others were bound. It would also have had to construe the language "shall not be taken away or in any wise abridged."[62]

The court, however, did not follow the analysis outlined above. Surprisingly, it rejected the concept of the supremacy of federal law in the area of Indian affairs and the rules of interpretation noted.

Instead it held that the federal government was "not authorized" to preserve Indian rights in the ceded area.[63] It held that there was merit in the state's theory that the federal government "had no authority" to act for the state or permit the state to release a portion of its sovereign powers.[64] It held that the federal government could not "nullify" the "functioning and jurisdiction" of the state.[65] It held that since the state was not a "party" to the Agree-

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61. *Puyallup v. Department of Game*, 391 U.S. 392 (1968).

62. Appellants argued that the language "shall not be taken away or in any wise abridged" took this case out of the area of application of the *Puyallup* decision which involved treaty language which did not have such limiting words. Appellants argued also, however, in the alternative, that even if *Puyallup did apply*, the particular regulations in question here violated appellants' federally protected rights under the guidelines laid down by decisions subsequent to Puyallup. See e.g. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969), holding that a state must show separate consideration for Indian rights and meet the burden of showing that they are necessary for conservation. Accord, *Department of Game v. Puyallup Tribe*, 80 Wn.2d 561 (1972).

63. App. A, p. A-4.

64. App. A, p. A-10.

65. App. A, p. A-16.

ment, its powers over game could not be affected thereby.[66] And it held that the federal government had no "intent" to preserve special rights for the Indians.[67]

To hold that there was no intent in the Agreement to preserve Indian rights violates the tenants of construction of Indian agreements noted above.

To hold that no agreement could be made concerning Indian rights over wildlife on former lands because the state was not a party to the agreement, violates settled law. *Choate v. Trapp*, 224 U.S. 665 (1912).

To hold that the federal government had no authority to grant the request of the Indians that they retain part of their property rights, contradicts the concept of plenary authority of the Congress over Indian affairs. It ignores the fact that the land and hunting rights were under the absolute control of the federal government and Indians at the time of the Agreement and thus were subject to agreement by those two parties.

To hold that different rules of interpretation, and different concepts of federal authority apply to "treaties" made before 1871 than to agreements, statutes, etc. made after that time, violates not only rulings of this court, but the state court's own ruling as well.

In *State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 183 (1960), the court held that the 1871 Act[68] ". . . did not affect the federal government's exclusive jurisdiction over

66. App. A, p. A-5-7.

67. App. A, p. A-12.

68. The act terminating the right of the Senate to deal with the Indians by treaty. Act of March 3, 1871 (16 Stat. 544, at 566, 25 U.S.C. 71).

the Indian tribes, but was only a decision to govern its Indian wards by Congressional enactment rather than by treaty . . . The historical circumstances, which made exclusive federal jurisdiction over the Indians necessary preclude any notion of residual state powers."

Finally, to hold that the federal government had no authority under the Indian Commerce power to preserve Indian hunting rights as hunting is not commerce, is wrong.[69] In so holding the court again makes the mistake of citing cases from areas of the law inapplicable to an Indian situation.[70] The correct rule is that:

> The Congressional power over commerce with the Indian tribes plus the treaty-making power is much broader than the power over commerce between states.

Federal Indian Law, p. 27.

This power is a ". . . plenary power granted or implied in article I, section 8, clause 3 of the Constitution to regulate tribal activities and thereby the activities of individual members." *Federal Indian Law*, p. 27. It is ". . . a power as broad and as free from restrictions as that to regulate commerce with foreign nations." *U.S. v. 43 Gallons of Whiskey*, 93 U.S. 188, 194 (1876).

CONCLUSION

Taken as a whole, the State Supreme Court's opinion amounts to a holding that the federal government had neither the authority nor intent to reserve hunting rights for the Colville Tribe on reservation land to be ceded to the federal government. It amounts to a holding that, al-

69. App. A, p. A-16.

70. i.e. *Geer v. Connecticut*, 161 U.S. 519 (1896).

though it would appear on the face of the cession agreement that the Indians intended to reserve hunting rights, the state subsequently took jurisdiction over those lands without that reservation of rights. The opinion further constitutes a holding that although the Colville Indians ceded their reservation lands, reserving a right to hunt that would not be "taken away or in any wise abridged," in fact the State of Washington may abridge, take away or regulate those rights at will.

To come to such conclusions, the state court violated rules of interpretation and construction concerning Indian agreements as outlined by the United States Supreme Court. In so doing it effectively denied to the federal government its authority over Indian affairs. Its holding, if allowed to stand, would appear to effectively block an attempt by an Indian tribe to cede its reservation lands to the federal government provided it retained hunting and fishing rights on that land.

The state court applied the technical rules of municipal jurisprudence in construing the federal agreement and the federal statutes dealing with the Colvilles.[71]

This it may not do as this court has held that different rules are to apply for the protection of Indians. *Winters v. United States*, 107 U.S. 564 (1907); *Choctaw v. United States*, 119 U.S. 1 (1896).

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71. See e.g. App. A, p. A-5 (Contracts), p. A-14 (Conflicts Between Federal and State Powers), p. A-16 (Interstate Commerce Powers), p. A-17 (Conflicts Between Federal and State Regulation).

A promise was made to the Indians by the federal government in return for their land. That promise should be kept.

Respectfully submitted,

ZIONTZ PIRTLE, MORISSET
& ERNSTOFF
By MASON D. MORISSET
Attorneys for Appellants

October, 1973

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,* v. ALEXANDER J. ANTOINE, and IRENE F. ANTOINE, his wife, *Appellants.*	No. 42420 EN BANC Filed July 12, 1973

The appellants were charged in superior court with the offenses of hunting during closed season (RCW 77.16.020) and possession of deer during closed season (RCW 77.16.-030). The offenses occurred on unallotted nonIndian land in what was once the north half of the Colville Indian Reservation. By way of defense, the appellants asserted that they were not subject to the state's game protection laws, immunity from such laws having allegedly been promised them by the United States government under the terms of an agreement signed by agents of the government and by members of their Indian tribe in 1891. The trial court held that the agreement was not intended to afford such immunity from state laws, and entered judgment and sentence, from which this appeal has been taken.

The appellant husband is an enrolled member of the Confederated Tribes of the Colville Reservation, and it is not questioned that he and his wife are beneficiaries of the agreement in question, which was executed when the Indians residing on the reservation, for a stated price, ceded their right of occupancy and use of the northern half of

the reservation to the United States, owner of the fee.[1] Under the terms of the agreement certain lands in the ceded portion were to be allotted to Indians then residing on the northern half. A school and a millsite and buildings were to be provided on the ceded lands.

Article 6 of the agreement stated:

> It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal;[2] that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said

1. The Colville Reservation was created by executive order on July 2, 1872. 1 Kappler 915-916.

> It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

Spalding v. Chandler, 160 U.S. 394, 402, 40 L. Ed. 469, 16 S. Ct. 360 (1896).

2. Const. art. 26, Compact with the United States, provided that the state should impose no taxes on lands or property belonging to the United States, with the proviso:

> That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

> Indians shall not be taken away or in anywise abridged.

It is upon the final clause of this article that the appellants place their reliance. It is their theory that, before the northern half of the reservation was ceded under the terms of this agreement, their ancestors had the exclusive, absolute, and unrestricted right to hunt and fish upon the entire reservation, and that it was this right which the agreement was intended to preserve. The appellants do not claim to have succeeded to the interest of an allotment Indian, but it is their assumption that this provision was intended to guarantee to all the Indians on the reservation —and not just to the allotment Indians—the right to hunt on the ceded half. The state does not dispute this interpretation.

We think a plausible argument could be made that this clause, like all the other clauses in this article, was intended to guarantee to the allotment Indians the right to hunt and fish upon the southern half of the reservation, inasmuch as they would no longer be living on the reservation proper and might have their right to hunt there questioned, if it was not clarified in the agreement. Also, since it was contemplated that the unallotted lands in the ceded portion of the reservation would be opened to settlement,[3] and it was reasonably to be foreseen that the settlers might fence their land and exclude the Indians and others from

3. "By the act of July 1, 1892, c. 140, 27 Stat. 62, a specified tract or portion of the reservation—with certain exceptions—was 'vacated and restored to the public domain' and it was provided that this tract should be open to settlement and entry by the proclamation of the President and should be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The exceptions were made by Congress in order to care for the Indians residing on that portion of the reservation." *United States v. Pelican*, 232 U.S. 442, 445, 58 L. Ed. 676, 34 S. Ct. 396 (1914).

hunting thereon, the allotment Indians might have no place to hunt, outside their individual allotments, unless they could hunt upon the reservation.

However, since the state has not seen fit to adopt or argue this theory and since we also find merit in the theory which the state does advance, we do not rest our decision here upon that possible interpretation of the agreement. It is the state's position that the federal government was not authorized to curtail the state's right to exercise its police power, in this contractual agreement, and that it did not purport to do so.

The appellants, on the other hand, while acknowledging that the instrument in question is in fact a contract and that the executive branch was not authorized to make treaties with the Indians at the time the agreement was entered into,[4] nevertheless insist that the agreement should be given the full force and effect of a treaty—in other words, that it constitutes the supreme law of the land—and further maintain that the plain import of its words is that the right to hunt and fish on the ceded and unallotted lands should never be subject to state regulation.

We cannot agree with the proposition that there is no significant difference between a contract and a treaty. A treaty is defined in Black's Law Dictionary (4th rev. ed. 1968), citing *Edye v. Robertson,* 112 U.S. 580, 28 L. Ed. 798, 5 S. Ct. 247 (1884); *Ex parte Ortiz,* 100 F. 955 (C.C.D., Minn. 1900); and *Charlton v. Kelly,* 229 U.S. 447,

4. *See* Act of March 3, 1871, ch. 120, Rev. Stat. § 2079: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

57 L. Ed. 1274, 33 S. Ct. 945, 46 L.R.A. (n.s.) 397 (1912), as follows:

> An agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state.

A treaty must be entered into with the advice and consent of the senate and must be ratified by two-thirds of the senators present. U.S. Const. art. 2, § 2. Once ratified, a treaty becomes the supreme law of the land. U.S. Const. art. 6. A treaty which deals with a matter of national and international concern may contain provisions, binding upon the states, which the Congress, without such treaty, would have no power to enact. *Missouri v. Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920). States are forbidden to enter into treaties. U.S. Const. art. 1, § 10.

A contract, on the other hand, can be enforced only against those party to it. *McIntyre v. Johnson*, 66 Wash. 567, 120 P. 92 (1912). *See* 17 Am. Jur.2d *Contracts* §§ 1, 15 (1964). A state is bound by contracts executed in its behalf by its duly authorized agents, provided the contract does not contravene the constitution and does not divest the state of its essential attributes of sovereignty or its governmental powers. 81 C.J.S. *States* §§ 112-13 (1953). 49 Am. Jur. *States, Territories, and Dependencies* § 62 (1943). But before a contract liability can be imposed upon a state, there must be a contractual obligation on its part.

The United States, as a body politic, and as an incident of its sovereignty, may enter into contracts, express or implied, appropriate to the just exercise of its constitutional

powers, if not prohibited by law, even though there is no special statute authorizing the government to contract. 91 C.J.S. *United States* §§ 81-82 (1955).

There is no argument by the state that the contract between the United States and the Indians of the Confederated Tribes was made without authority. The appellants, on the other hand, do not suggest that the state was a party to the contract or that the agents of the federal government who negotiated and signed the contract were authorized to act on behalf of the state.

Did the parties nevertheless intend that the state should be considered a party to this agreement?

Looking to the terms of the agreement, we find that the promises made by the federal government, setting aside for the moment the clause relating to hunting and fishing rights, were all undertakings which it was within the power of the federal government to perform. These included the payment of a stated sum for the ceded land, the allotment of certain lands to the Indians living on the north half of the reservation, the setting aside of sites and the building and maintenance of schools and other structures on the ceded land, the guarantee of water rights on the allotted land, and the exemption from taxation of the allotted land "within the limitations prescribed by law."

The latter provision is the only one in the agreement which makes any reference to state or local government, and the provision itself is in harmony with article 26 of the constitution of the state of Washington. In making this promise, then, the United States did not purport to invade any reserved power of the state but merely set forth in the

agreement a right which was already guaranteed under the state constitution.

Thus, nowhere in the agreement did the federal government purport to act on behalf of the state of Washington or to cede any of its jurisdiction. The state itself could not have lawfully made such a cession had it been a party to the agreement. Yet the appellants earnestly contend that the court must read into the language promising the continuation of hunting and fishing rights a promise that the state of Washington would not exercise its right, under the police power, to regulate hunting upon those ceded lands which were to become a part of the public domain.

It was implicitly recognized by the United States Supreme Court in *United States v. Pelican*, 232 U.S. 442, 58 L. ed. 676, 34 S. Ct. 396 (1914), that lands within the public domain which are not subject to the exclusive jurisdiction of the federal government are subject to the jurisdiction of the state. In that case, the defendant, charged with a crime under federal law, took the position that he was not subject to federal jurisdiction because the crime was not committed on the Colville reservation but rather was committed on allotted lands located outside the diminished reservation.

In holding that the allotted lands were Indian country and therefore subject to federal jurisdiction, the Supreme Court took cognizance of the fact that Congress in the act of July 1, 1892, c. 140, 27 Stat. 62, vacated and restored to the public domain a certain portion of the reservation (that portion upon which the offenses charged in this action occurred), to be disposed of under the general laws applicable to the disposition of public lands in the state of

Washington.[5] The court also recognized that upon the expiration of the trust period, the allottees were, according to the terms of the act of Congress, to become subject to and to have the benefit of the laws, both civil and criminal, of the state.[6]

It is evident that Congress was aware that the ceded and unallotted lands when opened for settlement, if not before, would come under the jurisdiction of the state. In fact, the appellants do not question the state's power to regulate the taking of game on the land in question; they claim only to be exempt from the operation of the game laws by virtue of the terms of the agreement of 1891. It is their theory that the rights promised them under the agreement must include immunity from state regulation, else they were promised nothing which they would not have had without the agreement.

5. *See also State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 356 P.2d 985 (1960). Another situation involving the question of federal jurisdiction was before the court in *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276 (1936), where we held that the federal government can secure exclusive juridiction over lands purchased within a state only if the state cedes such jurisdiction pursuant to article 1, section 8 of the constitution of the United States, providing that such jurisdiction can be ceded if the land is to be used for certain enumerated purposes. Lands set aside by the federal government for Indian reservations, either through treaty or by executive order, are also under the jurisdiction of the United States by reason of the power of the federal government to regulate Indian affairs. *See* 41 Am. Jur.2d *Indians* § 50 (1968). That power appears not to have been granted by any express provision of the constitution, but has never been denied.

6. *See Matter of Heff*, 197 U.S. 488, 509, 49 L. Ed. 848, 25 S. Ct. 506 (1905), where the court said: "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

As stated before, the appellants assert that, before the cession of the northern half of the reservation, they had the exclusive right to hunt thereon, unconstrained by state game regulations, and that it was the intent of the agreement to preserve this right on the ceded land. They acknowledge that the hunting rights on the reservation were subject to federal regulation at the time of the treaty and declare that they are subject to such regulation off the reservation, although they cite no legal authority for this proposition.[7]

Counsel also conceded in oral argument that the present owners of land in the northern half of the reservation have the right to fence their land and exclude hunters. Nevertheless they maintain that state regulation of the right to hunt is an abridgment of that right, within the meaning of the language as it was used in the contract.

According to the appellants' theory, then, the party who executed the contract—the United States—has the right to abridge their hunting rights by regulating them, and its successors in interest have a right to abridge them by excluding hunters from their land; but the state, which was not a party to the agreement and authorized no promise to be made on its behalf, cannot exercise its power and duty to protect its game, because that would amount to an unauthorized abridgment.

7. *See* 35 Am. Jur. 2d *Fish & Game* § 32 (1967), stating the general rule to be that the federal government has no power, aside from the power to enact statutes to carry out treaties respecting migratory birds (*Missouri v. Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920)), to prescribe regulations for the protection of fish and game while within the boundaries of a state. In *Hunt v. United States*, 278 U.S. 96, 73 L. Ed. 200, 49 S. Ct. 38 (1928), however, it was held that the United Staes might exercise the proprietary right, on its own property, to kill game out of season for the purpose of protecting its game reserve.

We think that if it was contemplated that regulation of hunting rights would constitute an abridgment of those rights, the federal government would have agreed to exempt the Indians' rights from regulation. But it is not contended that it did so either expressly or impliedly. On the other hand, if it was thought that state regulation but not federal regulation would constitute an abridgment, an express provision to that effect should have been inserted, but only after the consent of the state had been sought and obtained.

Since the parties admittedly contemplated that the Indians' hunting rights would remain subject to regulation, it follows that regulation is not ipso facto an abridgment. We think the reasonable understanding of the parties must have been that the United States, as proprietor of the land, would not abridge the Indians' hunting and fishing rights.

Taking into account the fact that the federal government had no authority to and did not purport to act on behalf of the state or to commit it to release a portion of its sovereign powers, and the additional fact that all other provisions of the agreement were of the kind which were appropriate to such an agreement and within the power of the parties to perform, we are led to conclude that the parties intended their contract to embrace only matters which were within their control.

Whether the intent was to guarantee to the allotment Indians the right to hunt on other ceded lands as long as the white man and other Indians were allowed to hunt there, and on the southern half of the reservation with their fellow Indians—a promise which the parties could fulfill—or whether it was the intent to guarantee to all the Indians

of the tribe the right to hunt upon the unallotted lands in the ceded half, we think the language "in common with all other persons" was not without significance. It was known that the government intended to open these lands to settlement, that this was its purpose in acquiring them. This meant that proprietary rights would be exercised, that the lands might be fenced and hunters excluded. Under these circumstances, it was a reasonable undertaking for the purchaser of the land to agree to see to it that, as long as it held the land and allowed others to hunt thereon, the members of the tribe also should be allowed to hunt there.

The theory that the language of this agreement was intended to preserve the hunting and fishing rights intact, just as they had existed prior to the cession of the lands, cannot be reconciled with the fact of cession of all the Indians' "rights, titles, claim and interest" in the lands and the appellants do not contend that the language was meant to limit those words of cession. Such an interpretation would place a heavy encumbrance upon the title of every settler or purchaser.

Significantly, we find in the statutes authorizing the allotment of lands (act of Feb. 8, 1887, ch. 119, 24 Stat. 388), appropriating money for the purchase of the Indians' rights (act of June 21, 1906, Pub. L. No. 59-258, ch. 3504, 34 Stat. 325), and opening the unallotted land for settlement (act of July 1, 1892, ch. 140, 27 Stat. 62), no reference to the reservation of hunting and fishing rights. Other provisions of the agreement can be found reflected in these statutes, but upon the question of hunting and fishing, the statutes are silent.

Are we to assume that, by omitting these provisions from the enabling statutes, the United States Congress intended

to disregard a contractual undertaking on the part of its duly authorized commissioners? Research reveals no clue to the omission, but we assume that the government of the United States acted in good faith and that, according to its understanding of the import of the terms, thery were not intended to encumber the titles of settlers and purchasers or to impose restrictions upon the exercise of the police power by the state. Rather, we assume, it was thought that the undertaking on the part of the government was that of a proprietor and that the agreement could be performed within the normal functioning of the executive department.

There is expressed in these statutes an intent that the settlers and purchasers of the unallotted lands should take the title to the land unencumbered by restrictions in favor of those who had formerly enjoyed the right to occupy and use the land. They also manifest an intent that the Indians to whom land was allotted should receive their patents in due course and become citizens of the state, subject to all of its laws and entitled to receive their benefits. It is not in harmony with this expressed intent to assume that the Congress intended at the same time to grant to those Indians and to the Indians remaining on the reservation an immunity from the state's game regulation laws, assuming that it was within its power to grant such immunity. Such an intent cannot be found, either express or implied, in the statutes and it is not manifested in the agreement.

We are of the opinion that the trial court correctly construed the agreement of 1891, and that it was not the intent to guarantee to the Indians immunity from the laws of the state when hunting off the reservation.

We have no quarrel with the appellants' authorities, interpreting and giving force to Indian treaties. Such treaties are binding upon the states under the supremacy clause. U.S. Const. art 6. As the United States Supreme Court said in *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905), a state takes jurisdiction over its territory, when it is admitted to statehood, subject to the provisions of treaties adopted for purposes appropriate to the objects for which the United States held the territory prior to statehood. The agreement before us in this case is not a treaty and it was not signed before statehood. It is not the supreme law of the land. The statutes enacted by Congress in implementation of this agreement, which are the supreme law if they are within the power of the Congress to enact, make no reference to the provision relied upon by the appellants.

Even though it is bound by the provisions of a treaty, a state is not denied the right to enforce against the Indians its reasonable regulations for the preservation of fish. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1968). It would be anomalous indeed if the court were to hold that the state can be deprived of its power to regulate the taking of game through the execution of a contract to which it was not a party, but could not be so deprived by the execution of a treaty admittedly within the power of the federal government to sign, which is declared by the constitution to be the supreme law of the land. We do not, however, reach the question whether this can be done by contract, since it is our conclusion that it was not intended to be done in this case.

Our view of the proper interpretation of this agreement is in harmony with the principles which have guided the courts in deciding questions which involve an alleged conflict between the exercise of federal and state powers. The United States Supreme Court said in *South Carolina v. United States*, 199 U.S. 437, 448, 50 L. Ed. 261, 26 S. Ct. 110 (1905):

> We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty.

This principle was recognized by the Supreme Court in *Dick v. United States*, 208 U.S. 340, 52 L. Ed. 520, 28 S. Ct. 399 (1908), a case strongly relied upon by the appellants. There, the defendant was prosecuted under the federal laws prohibiting the introduction of intoxicating liquor into Indian country. The violation occurred on land which had been ceded by the Nez Perce Indians to the United States. Under the terms of the agreement, the lands ceded and allotted were to remain subject to the protection of the federal laws prohibiting the introduction of liquor into the Indian country. The court upheld the agreement.

Insofar as the opinion in that case reveals, the state of Idaho was not a party to the action. It was not contended that the federal laws were in conflict with or superseded state laws; rather the defense was that the federal govern-

ment did not have jurisdiction over this offense, because exclusive jurisdiction resided in the state. The court held, in the exercise of its constitutional power to regulate commerce with the Indians, the federal government might enforce an agreement of this kind for a reasonable period of time—in that case, 25 years. The court said:

> In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a State, upon its admission into the Union, is thereafter upon an equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own constitution. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, and such power is superior and paramount to the authority of any State within whose limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other. In regulating commerce with Indian tribes Congress must have regard to the general authority which the State has over all persons and things within its jurisdiction. So, the authority of the State cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes.

208 U.S. at 353.

Inasmuch as no conflict between the agreement and existing state law was found in that case, the court found it possible to give effect to the agreement without infringing upon the jurisdiction of the state. The case differs from this in several important aspects. In the first place the question before the court was not one of interpretation, the language of the agreement being unambiguous and the

only question being, was it enforceable? The state was not a party to the action and did not claim that enforcement of the agreement would interfere with the exercise of its police power. Further, the agreement was made in the exercise of a constitutional power of the federal government—that of regulating commerce with the Indian tribes. That the hunting of game is not commerce has been long settled. *Geer v. Connecticut*, 161 U.S. 519, 40 L. Ed. 793, 16 S. Ct. 600 (1896). Another significant difference is that the duration of the agreement in that case was only 25 years, whereas here the agreement is not limited as to time. The reasonableness of the period of time covered by the agreement, as well as the absence of any conflict with state laws, were factors to which the court appears to have given substantial weight in sustaining it.

The statement of the court in *Dick* which is applicable here is that which is found in the quoted paragraph—that in performing their proper functions, each of the two governments, federal and state, must have regard to the proper functioning and jurisdiction of the other and that neither of these must be allowed to nullify the other.

It is a fundamental principle of which the court was undoubtedly aware in the *Dick* case, that the power of a state to govern man and things will not be lightly stricken down by implication, and an unexpressed purpose of Congress to set aside statutes of states regulating their internal affairs is not lightly to be inferred and ought not to be applied where the legislative command, read in the light of its history, remains ambiguous. The intention of Congress to exclude the states from exercising their reserved powers must be clearly manifested. If it is claimed that a federal act conflicts with a state act, it must be clear that the

federal provisions are inconsistent with those of the state in order to justify the thwarting of state regulation. *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 82 L. Ed. 3, 58 S. Ct. 87 (1937); *California v. Zook*, 336 U.S. 725, 93 L. Ed. 1005, 69 S. Ct. 841 (1949); 81 C.J.S. *States* § 7, pp. 886-87 (1953).

This rule applies, of course, where both the federal and state governments are acting within their proper jurisdiction and it applies to acts of Congress, the supreme law of the land. If these are the governing principles when the court is viewing laws of such dignity, they are all the more forceful where the court is asked to hold that the federal government, in a contract to which the state was not a party and to which it did not give its consent, has undertaken to bind the state to renounce one of the powers which it is bound to exercise for the common welfare.

We are convinced that our interpretation of the agreement of 1891 gives full effect to the proper objectives and intentions of the parties, while preserving to the state the right to exercise its police power in an area properly within its jurisdiction.

The judgment is affirmed.

We concur:

HALE, C. J.
/s/ ROSELLINI, J.
FINLEY, J.
STAFFORD, J.
HAMILTON, J.
BRACHTENBACH, J.

No. 42420

UTTER, J. (concurring in part)— I concur in that portion of the opinion which construes article 6 to guarantee allotment Indians the right to hunt and fish upon the southern half of the reservation.

/s/ UTTER, J.

I Concur

WRIGHT, J.

APPENDIX B

STATE OF WASHINGTON, *Plaintiff,* v. ALEXANDER J. ANTOINE, and IRENE F. ANTOINE, his wife, *Defendants.*	No. 4859 Findings of Fact and Conclusions of Law

THIS MATTER, having come on regularly before the undersigned judge, the court having heard the stipulation of counsel concerning the facts of the case, and having listened to oral arguments of Mr. Larry Coniff, Deputy Attorney General for the State of Washington, and Mr. Mason D. Morisset, general counsel for defendant herein, now makes the following

FINDINGS OF FACT

1. On September 1, 1971, defendant, Alexander Antoine, was engaged in the activity of hunting for deer in Ferry County, Washington, within the exterior boundaries of the original Colville Indian Reservation as established by the President of the United States by Executive Order in 1872.

2. On September 11, 1971, defendant, Alexander Antoine, did also have in his possession a game animal, to-wit: a deer.

3. At the time of such hunting and possession, *i.e.*, September 11, 1971, hunting season was closed for deer in this particular area within Ferry County.

4. Defendant, Alexander Antoine, is a duly-enrolled member of the Confederated Tribes of the Colville Reservation.

5. The action herein complained of, *i.e.*, hunting and possession of a deer in closed season, occurred outside the exterior boundary of the Colville Indian Reservation as it presently exists.

6. The land on which the deer was shot was non-trust, unallotted, non-Indian owned land.

7. In 1891 the United States entered into an agreement with the Confederated Tribes of the Colville Reservation, entered in this cause as defendant's Exhibit 4, which contains the following language in Article VI:

> "... the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."

FROM THE FOREGOING, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and subject matter of this action.

2. The Colville Indians and defendant herein are bound by the 1891 agreement with the United States Government which gave the Indians the right to hunt and fish in common with all others. This means that defendant is bound by the State conservation laws as all others are bound.

3. Having shot and been in possession of a deer during closed season, defendant is guilty of taking a deer out of season in violation of RCW 77.16.020 and guilty of unlawful possession of a deer in closed season in violation of RCW 77.16.030.

DONE IN OPEN COURT this 27th day of July, 1972.

/s/ RICHARD J. ENNIS
Judge

Presented by:

PROSECUTING ATTORNEY
FOR FERRY COUNTY
/s/ GRANVILLE EGAN

Copy Received and Approved
for Entry:
ATTORNEY GENERAL OF
STATE OF WASHINGTON
/s/ LARRY CONIFF
Deputy Attorney General

Copy Received and Notice of
Presentation Waived:
ZIONTZ, PIRTLE & MORISSET
/s/ MASON D. MORISSET
Attorneys for Defendants

APPENDIX C

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FERRY

STATE OF WASHINGTON, *Plaintiff,* v. ALEXANDER J. ANTOINE, and IRENE J. ANTOINE, his wife, *Defendants.*	No. 4859 Judgment and Sentence [Filed 5/18/72]

This matter coming on regularly for hearing before the undersigned on the 14th day of January 1972, the defendants Alexander and Irene Antoine, appearing in person and with their attorney Mason D. Morisset of Ziontz, Pirtle and Morisset of Seattle; the defendants having been charged with violations of RCW 77.16.020; 77.16.030; and RCW 77.16.050, committed 11 September 1971, and were tried in District Court No. 1, Ferry County, Washington, to all of which charges defendants pleaded Not Guilty in this Court after a prior finding of Guilty in the District Court: and Appeal having been made hereto, and Trial having been had in this Court, Witnesses having been sworn and evidence introduced by the State of Washington, and on behalf of the defendants, and argument having been made, and,

It APPEARING this Court found the defendants Guilty of violating RCW 77.16.020 and 77.16.030, and that, on the

motion of the State the charge of violating RCW 77.16.050, was dismissed and

It APPEARING that the District Court sentenced Alexander Antoine to 30 days with 25 days suspended, plus one year probation, and the defendant Irene Antoine 30 days, suspended, with one year probation, and

It APPEARING THAT each defendant personally, their attorney, Mason D. Morisset, and the Assistant Attorney General and the Prosecuting Attorney all have stipulated in writing filed in this Court that such sentence of the District Court was reasonable under the particular circumstances, and each would agree that the same sentence be the sentence of the Hon. Richard J. Ennis, the Trial Judge herein, and

It APPEARING that the defendants have waived their right to be present at the signing of the sentence in this case. NOW THEREFORE

It is hereby ORDERED, ADJUDGED and DECREED that the defendants Alexander J. Antoine and Irene F. Antoine is each guilty of violation RCW 77.16.020, (hunting during closed season), it is further

ORDERED, ADJUDGED and DECREED that the defendant Alexander J. Antoine shall be confined in the County jail of Ferry County for 30 days, with 25 days thereof suspended, and is placed on probation to this Court for a period of one year from the entry of this Judgment,

It is further ORDERED that the defendant Irene F. Antoine shall be confined in the Ferry County Jail for 30 days, suspended, and shall be placed on probation to this Court

for a period of one year from date of the filing of this Judgment.

During the period of their probation each defendant shall be under the custody of the Sheriff of Ferry County, and shall make such reports and obey such reasonable rules as he shall direct.

Done in open Court this 16th day of May, 1972.

/s/ RICHARD J. ENNIS
Judge

Presented by:

/s/ GRANVILLE EGAN
Prosecuting Attorney for Ferry County

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,* v. ALEXANDER J. ANTOINE, and IRENE J. ANTOINE, his wife, Appellants.	REMITTITUR No. 42420 Ferry County No. 4859

The State of Washington to: The Superior Court of the State of Washington in and for Ferry County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 12, 1973, became the final judgment of this court in the above entitled case on August 13, 1973. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: No cost bill having been filed, costs are deemed waived.

cc. MR. MASON D. MORISSET
HONORABLE GRANVILLE EGAN
Reports Office

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 14th day of August, A.D. 1973.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington

[SEAL]

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALEXANDER J. ANTOINE and IRENE J. ANTOINE, *Appellants,* v. STATE OF WASHINGTON, *Appellee.*	No. 42420 Notice of Appeal to the Supreme Court of the United States

1. Notice is hereby given that Alexander J. Antoine and Irene F. Antoine, his wife, appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Washington entered July 12, 1973; confirming the judgment of conviction of the Superior Court for Ferry County, Washington, Cause No. 4859, signed and entered by the Honorable Richard J. Ennis, on May 16, 1972 and filed May 18, 1972.

2. This appeal is taken pursuant to 28 U.S.C. §1257 (2).

ZIONTZ, PIRTLE, MORISSET & ERNSTOFF
By /s/ MASON D. MORISSET
Attorneys for Appellants

September 18, 1973

PROOF OF SERVICE

I, Ann C. Musman, a secretary in the office of Ziontz, Pirtle, Morisset & Ernstoff, depose and say that on the 18th day of September, 1973, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on appellee herein: State of Washington, by deposit-

ing a copy thereof addressed to the Attorney General of the State of Washington, Temple of Justice, Olympia, Washington 98501, Attorney of Record for appellee, upon Joseph L. Coniff, Assistant Attorney General, 600 N. Capitol Way, Olympia, Washington 98501, and Granville Egan, Esq., Prosecuting Attorney for Ferry County, P.O. Box 613, Republic, Washington 99166 in a United States Post Office mailbox in Seattle, King County, Washington, with first class postage prepaid in compliance with United States Supreme Court Rule No. 33(1). All parties required to be served herein have been served.

/s/ ANN C. MUSMAN

SUBSCRIBED AND SWORN to before me this 18th day of September, 1973.

/s/ MASON D. MORISSET
Notary Public in and for the State of Washington, residing at Bellevue

APPENDIX F

[National Archives Document 21167—Indian Office Inclos. No. 8—1891]

Articles of Agreement—made and entered into on the 9th day of May A.D. 1891 at the Colville Indian Reservation in the State of Washington by Mark A. Fullerton, W. H. H. Dufur and James F. Payne Commissioners on the part of The United States appointed for the purpose, and The Indians residing on said reservation.

Article 1

The said Colville Indians residing and having their homes on the said Colville Indian Reservation upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, titles, claim and interest in and to and over the following described tract of Country on the Colville Indian Reservation in the State of Washington, viz.

Beginning at a point on the Eastern boundary line of the Colville Indian Reservation where the township line between townships 34 & 35 North of Range 37 East of the Willamette Meridian if extended West would intersect the same, said point being in the middle of the Channel of the Columbia River, and running thence West parallel with the forty ninth (49) parallel of latitude to the Western boundary line of the said Colville Indian Reservation in the Okanogan River, thence North following the said Western boundary line to the said forty ninth (49) parallel of latitude, thence East along the said forty ninth (49) parallel of latitude to the North East corner of the said Colville Indian Reservation, thence South following the Eastern boundary of said reservation to the place of beginning con-

taining by estimation one million five hundred thousand acres, the same being a portion of the Colville Indian Reservation created by Executive order dated April 9th 1872.

Article 2

Each and every Indian now residing upon the portion of the Colville Indian Reservation hereby ceded and relinquished and who is so entitled to reside thereon shall be entitled to select from said ceded portion Eighty acres of land which shall be allotted to such Indian in severalty. No restrictions as to locality shall be placed upon such selections other than that they shall be so located as to conform to the Congressional survey or sub-divisions of said tract or country, and any Indian having improvements may have the preference over any other person in and to the tract of land containing such improvements so far as they are within a legal sub-division not exceeding in area the quantity of land that he or she may be entitled to select and locate. All such allotments shall be made at the cost of the United States under such rules and regulations as The Secretary of the Interior may from time to time prescribe.

Article 3

All Indians residing in the lands hereby ceded and relinquished shall have the right if they so prefer under the direction of the Indian Agent to occupy and reside on such portions of the Colville Indian Reservation not hereby ceded as are not occupied by or in the possession of any other Indian or Indians.

Article 4

Whereas the lands used and occupied for School purposes at what is known as the Tonasket School on Buona-

parte Creek on said reservation have been ceded and relinquished to the United States, it is agreed and stipulated that in lieu thereof the United States will provide for a School site and school purposes a tract of land conveniently and desirably located upon the Colville Indian Reservation hereby ceded to contain Six Hundred and forty acres and upon the same at the cost of the United States, will erect suitable buildings for an Indian School and in all respects provide for the conduct, equipment and maintenance thereof as Indian Schools are now provided for, it being expressly understood and agreed that no part of the purchase money hereinafter mentioned of the lands hereby ceded is to be employed or expended in the erection of school buildings or in the maintenance of Indian Schools upon said Reservation. And it is further stipulated that in lieu of the Saw Mill, Grist Mill and other Mill property hereby ceded, the United States will provide a suitable and convenient Mill Site and will thereon at its own cost erect suitable buildings and place all necessary fixtures.

Article 5

That in consideration of the cession surrender and relinquishment to the United States of all the title, claim, rights, estate and interest of said Indians in and to the tract of land above described, the United States will pay to the said Indians, the beneficiaries of this agreement, to be distributed per capita, the sum of One Million Five Hundred Thousand Dollars payable in five annual installments of Three Hundred Thousand Dollars each, with interest thereon at five per centum after this agreement shall take effect.

In all such payments each and every Indian aforesaid

over the age of Eighteen years shall receive and receipt for his or her share of said purchase money as the same becomes due and payable, and with respect to the share of each and every Indian aforesaid who shall be under Eighteen years of age, the same shall be invested under the direction of the Secretary of the Interior for the benefit of such Indians at a rate of interest not less than five per centum per annum, and the interest thereof with so much of the principal as may be deemed necessary and proper, shall be paid annually to the father of such Indian so entitled and under the age of Eighteen years, if living, and if such father be dead, then the same shall be paid to the mother, if living, and in the event the said mother be dead, then the same shall be paid to the Indian Agent of the Colville Reservation for the use and maintenance of such orphan, and when such minors shall attain their majority, their shares in such purchase money, or so much thereof as may remain unpaid, shall be paid over to them together with any interest that may be due thereon.

Article 6

It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.

Article 7

It is agreed that the United States at its own cost, will erect on the Colville Indian Reservation not ceded at some point suitable and convenient to the Indians who may elect to remain upon the portion of the Reservation hereby ceded and have allotments set apart thereon as hereby stipulated, a blacksmith shop and furnish same with suitable tools and implements and employ a competent blacksmith for the benefit of said Indians.

Article 8

And whereas it is believed that many of the Indians above the age of Eighteen years residing and having their homes upon the said Colville Reservation are well advanced in industrial pursuits and economical training and possess habits so well formed as to warrant an early payment to such Indians of their shares in the purchase money of the lands hereby ceded and relinquished, it is therefore specially agreed and stipulated that the United States will pay in two equal annual installments with interest the shares of all such Indians above eighteen years of age in said purchase money who will furnish to The Secretary of the Interior a certificate in due form from the Indian Agent on said Colville Reservation to the effect that such Indian or Indians are of good character, of sober and industrious habits, and are suitable persons to entrust with the expenditure of money.

Article 9

It is stipulated and provided that such male adult Indians upon the Colville Reservation as do not on account of absence or for any other cause sign this agreement, shall upon receiving their shares in said purchase money, execute

and file with the Indian Agent on said Colville Reservation a brief relinquishment releasing to the United States all their right, title, interest and estate in and to the lands hereby ceded.

And it is further stipulated that in the event any of said Indians shall after reasonable notice given, fail, neglect, refuse or decline to receive and receipt for their shares in said purchase money, then and in all such cases under such rules and regulations as the Secretary of the Interior may prescribe, the share or shares of such Indians which are not claimed or called for, shall become common property of all Indians in said Reservation who conform to this agreement and they shall share and share alike therein.

Article 10

At the request of said Indians it is agreed and stipulated that the school site referred to in Article 4 of this agreement shall be located upon that portion of the lands hereby ceded which the Indians interested in said school may select. The Saw Mill and Grist Mill referred to in said Article 4 shall be located upon that part of said Reservation not ceded at such point as will be convenient to the Indians electing to remain on the ceded part of Reservation.

Article 11

That in further consideration of the said cession and relinquishment of the tract of land set forth and particularly described in this agreement, to the United States by said Indians and their Chiefs or head-men, and upon the understanding that said Chiefs and their people will faithfully perform this agreement, the United States in addition to the purchase money aforesaid will pay to Moses Chief of The Columbia Tribe of Indians the sum of One Thousand

Five Hundred Dollars in cash, to Joseph Chief of the Nez Perces tribe the sum of One Thousand dollars in cash, to Barnaby Chief of the Colville tribe the sum of one thousand Dollars in cash, to Antoine Chief of the Okanogan tribe the sum of one thousand Dollars in cash, and to Aripaughin Chief of the Lake tribe the sum of one thousand Dollars in cash, from and after the notification and approval of this agreement by Congress at which time the same will go into effect.

Article 12

This this agreement shall go into effect from and after its approval by Congress.

Witness our hands and seals the day and year first above written.

MARK A. FULLERTON, *Commissioner*
W. H. H. DUFUR, *Commissioner*
JAMES F. PAYNE, *Commissioner*

Antoine Chief Okanogans his X mark

* * *

[Balance of signatures, approximately 575 individuals, chiefs and sub-chiefs, is deleted.]

* * *

Signed, sealed and delivered in the presence of

HAL J. COLE
S. P. SHMIDT
E. C. THOMAS

I, Robert Flett, U.S. Indian Interpreter, for the Colville Indian Agency do hereby certify, on honor, that the foregoing agreement was carefully read and by me correctly interpreted and that the contents thereof were freely explained to, and fully understood by said Indians before the signing and sealing of the same.

Witness
A. M. ANDERSON /s/ ROBERT FLETT

APPENDIX G

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitutional Provisions:

United States Constitution, Art. I §8, cl. 3

> "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States and with the Indian Tribes;"

United States Constitution, Art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Executive Order:

Executive Order Dated July 2, 1872

EXECUTIVE MANSION
Washington, July 2, 1872

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U.S. GRANT

Congressional Act:

Act of June 21, 1906 (34 Stat. 325)

To carry into effect the agreement bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and

commissioners appointed by the President of the United States under authority of the act of Congress approved August nineteenth, eighteen hundred and ninety, to negotiate with the Colville and other bands of Indians on said Colville Reservation for the cession of such portion of said reservation as said Indians might be willing to dispose of, there shall be set aside and held in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for one million five hundred thousand acres of land opened to settlement by the act of Congress 'To provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes,' approved July first, eighteen hundred and ninety-two, the sum of one million five hundred thousand dollars, . . .

United States Statute:

25 U.S.C. §2 Duties of Commissioner

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

State Statutes

Revised Code of Washington

77.16.020 ***Taking during closed season—Exceeding bag limits—Taking within reserves.*** It shall be unlawful for any person to hunt, trap, or fish for any game birds, game animals, fur-bearing animals or game fish during the respective closed seasons therefor. It shall also be unlawful for any person to kill, take, or catch any species of game birds, game animals, furbearing animals, or game fish in excess of the number fixed as the bag limit. It shall also be unlawful for any person to hunt or trap for any game birds, game animals, or fur-bearing animals within the boundaries of any game reserve or closed area, and it shall likewise be unlawful for any person to fish for any game fish within any closed waters or within the boundaries of any game fish reserve.

Any person who hunts or traps any elk, moose, antelope, mountain goat, mountain shepp, caribou or deer in violation of this section is guilty of a gross misdemeanor and shall be punished by a fine or not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who hunts or traps any game bird in violation of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

77.16.030 ***Possession during closed season or in excess of bag limits.*** It shall be unlawful for any person to have in his possession or under his control any game bird, nongame bird, game animal, fur-bearing animal, or game fish, or part thereof, during the closed season or in excess of the bag limit.

Any person who has in his possession or under his control any elk, moose, antelope, mountain goat, mountain sheep, caribou, deer, or parts thereof in violation of the foregoing portion of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who has in his possession or under his control any game bird or part thereof in violation of the foregoing portion of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

Provided, That any person who has lawfully acquired possession of any game bird, game animal, or game fish,

or part thereof, and who desires to retain it for human consumption or ornamental purposes, or desires to sell the skin, hide, horns, head, or plumage thereof, after the close of the season may do so in accordance with the rules and regulations of the commission.

Provided, further, That the owner of any game bird, nongame bird, game animal, fur-bearing animal, or game fish, who has lawfully propagated it or purchased from one who has so propagated it, may possess, ship, sell or otherwise dispose of such bird, animal or fish, when properly tagged or sealed.

SUPREME COURT, U. S.
JAN 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-717

ALEXANDER J. ANTOINE and
IRENE F. ANTOINE, his wife, *Appellants,*

v.

THE STATE OF WASHINGTON, *Respondent.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

SLADE GORTON,
Attorney General,
State of Washington,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General,
Attorneys for Respondent.

Office and Post Office Address:
600 No. Capitol Way
Olympia, Washington 98504
Telephone: AC 206, 753-2498

January, 1974

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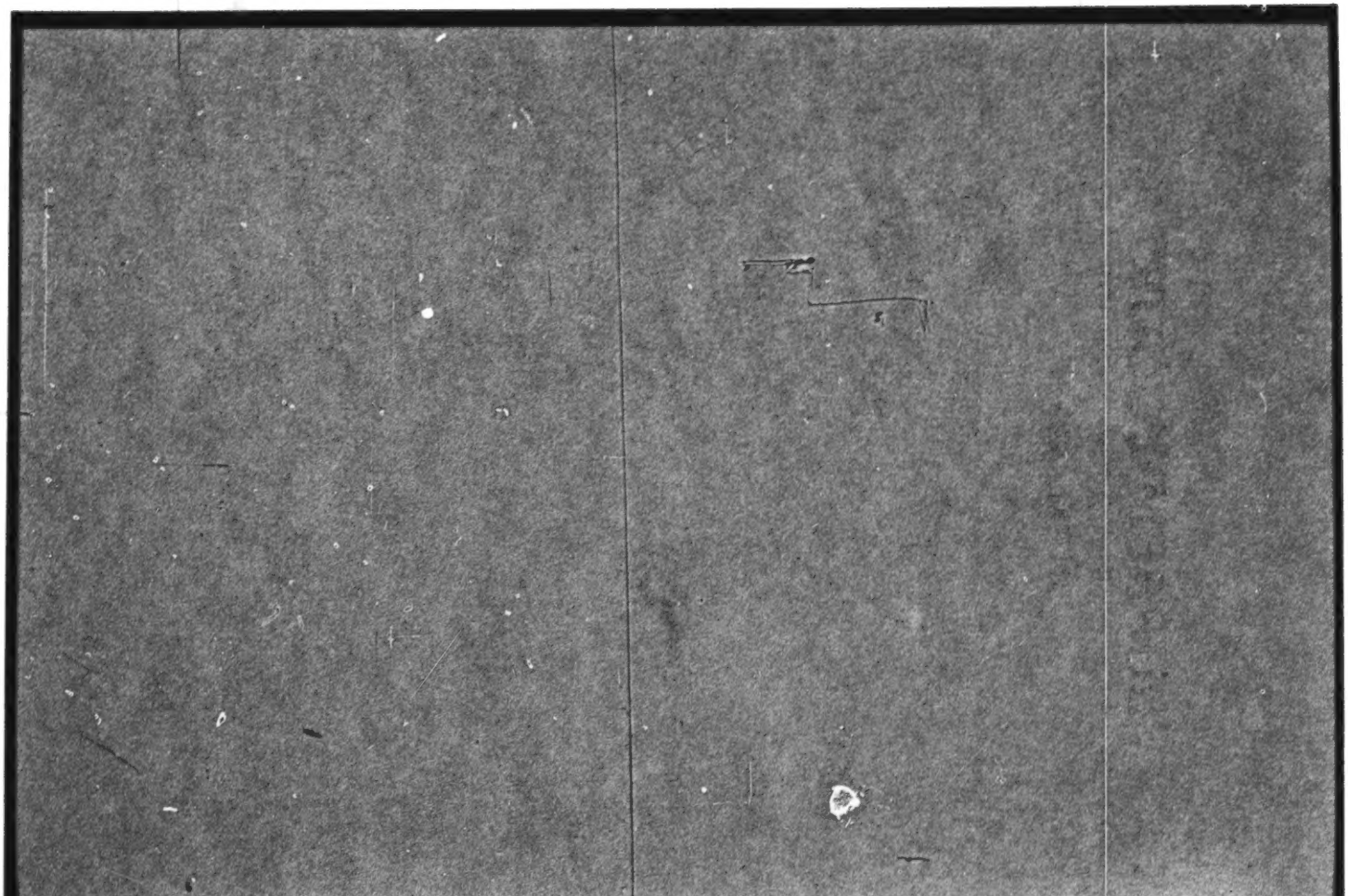

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THE STATE OF WASHINGTON, *Respondent*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTION STATEMENT

Pursuant to Rule 16 of the United States Supreme Court, Respondent State of Washington moves that the above-entitled appeal from the Supreme Court of the State of Washington be dismissed and that the opinion of the Supreme Court of the State of Washington entered July 12, 1973, confirming the judgment of conviction of appellants in the Superior Court for Ferry County, Washington, Cause No. 4859, be affirmed.

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported at 82 Wn.2d 440, ... P.2d ..... (1973). A copy of the opinion is reprinted as Appendix A to Appellants' Jurisdictional Statement. Findings of the Ferry County Superior Court are reprinted as Appendix B and Appendix C to Appellants' Jurisdictional Statement. The Remittitur of the Washington State Supreme Court is reprinted as Appendix D to Appellants' Jurisdictional Statement.

JURISDICTION

Respondent State of Washington concurs in the statement as to jurisdiction as set forth by appellants. (App. Br., pp. 2-3)

STATUTES AND FEDERAL LAWS INVOLVED

Respondent State of Washington concurs with the list of statutes and federal laws involved as set forth in Appellants' Brief at pages 3-4 but would point out that the following statutes are also involved in this appeal: 25 U.S.C. 71, 27 Stat. 62, 34 Stat. 80, 39 Stat. 123, 39 Stat. 672, 39 Stat. (part 2) 778.

QUESTIONS PRESENTED

Respondent disagrees with the statement of questions presented by appellants. Respondent believes that the following questions are presented by this appeal:

(1) Were the original boundaries of the Colville Indian Reservation validly diminished by Congress?

(2) Is the 1891 "Agreement of Sale" between the Colville Indian Tribe and the Federal Government a treaty within the meaning of the Supremacy Clause of Article VI of the Constitution of the United States?

STATEMENT OF THE CASE

Respondent concurs with the Statement of the Case as presented by appellants but points out that, in addition to the Statement of the Case, the following were stipulated as material facts:

(5) That the offenses occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists.

(6) That the land upon which the offenses occurred was unallotted, non-Indian land at the time of the offenses.[1]

A map was introduced into evidence by stipulation with a red circle drawn upon it indicating that the area where the offenses occurred is outside the exterior boundaries of the Colville Indian Reservation and is located on what is referred to hereinafter in this brief as the "Northern Half" of the original Colville Indian Reservation.[2]

ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

(1) Were the original boundaries of the Col-

[1] R. 50.
[2] State's Exhibit #1.

> ville Indian Reservation validly diminished by Congress?

The original Colville Indian Reservation was established by Executive Order signed by President Ulysses S. Grant on July 2, 1872. I. *Kappler, Indian Affairs, Laws and Treaties*, pp. 915-916. The original Colville Indian Reservation boundaries extended to the 49th parallel, which is the Canadian border.

On July 1, 1892, Congress opened the Northern Half of the original Colville Indian Reservation to settlement by non-Indians. 27 Stat. 62-64. The statute provides that the "Northern Half":

> be, and is hereby, vacated and restored to the public domain, not withstanding any Executive Order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be opened to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. (27 Stat. at 63)

Congress has subsequently referred to the Colville Indian Reservation as "diminished" thus recognizing that the Northern Half had been effectively removed from its reservation status.[3]

The fact that the Colville Indian Reservation has been diminished was recognized by the United States Supreme Court in *Seymour v. Superintendent*, 368 U.S. 351 (1962). In that case the Court was con-

[3] 27 Stat. 62; 34 Stat. 80, 81, 82; 39 Stat. 123 at 154; 39 Stat. 672; 39 Stat. (part 2) 778; III. Kappler, *Indian Affairs, Laws and Treaties* at p. 7; V. Kappler, *Indian Affairs, Laws and Treaties*, at p. 287.

fronted with a question of jurisdiction of the State of Washington for a criminal offense committed by a Colville Indian on the diminished reservation, i.e., Southern Half, in the town of Omak. The Court overruled the Supreme Court of the State of Washington which had previously held that the state possessed jurisdiction over the Southern Half. 351 U.S. at 357. In reaching this conclusion, the Court was careful to distinguish between the Southern Half, i.e., diminished reservation boundaries and the jurisdictional status of the Northern Half. The Court stated:

> The case turns upon the current status of the Colville Indian Reservation—a reservation created in 1872 by Executive Order of President Grant which declared that "the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for" the Colville Indians. *In 1892, the size of this reservation was diminished when Congress passed an Act providing that, subject to reservations and allotments made to individual Colville Indians, about one-half of the original Colville reservation, since commonly referred to as the "North Half," should be "vacated and restored to the public domain.* * * *" This Act did not, however, purport to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the government for their (the Colville Indians') use and occupancy. Since the burglary of which petitioner was convicted occurred on land within the South Half, it is clear that state

jurisdiction over the offense charged, if it is to be found at all, must be based upon some federal action subsequent to the 1892 Act. (368 U.S. at 354. Emphasis Supplied.)

(2) Is the 1891 "Agreement of Sale" between the Colville Indian Tribe and the Federal Government a treaty within the meaning of the Supremacy Clause of Article VI of the Constitution of the United States?

Congress has prohibited further execution and ratification of Indian treaties subsequent to March 3, 1871:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.[4]

This Court has interpreted this statute as "prohibiting the making of any contract with the Indians by treaty." *Starr v. Long Jim*, 227 U.S. 613, 623 (1913). Congress chose to regulate its relationship with Indians by direct act of Congress rather than by the treaty making power. *Elk v. Wilkins*, 112 U.S. 94 (1884); *In re Heff*, 197 U.S. 488 (1905). As noted by the court below:

> The agreement before us in this case is not a treaty and it was not signed before statehood. It is not the supreme law of the land. The statutes which are the supreme law if they are within the power of the Congress to enact, make

[4] 23 Stat. 79, 25 U.S.C. 71.

no reference to the provision (of the 1891 agreement) relied upon by the appellants.[5]

The Federal Government did not, by virtue of its 1891 agreement of sale with the Colville Indian Tribe purport to bargain away the right of the State of Washington, under its police power, to manage its own natural resources.[6] This Court has recognized that the Northern Half of the Colville Indian Reservation has been vacated as a reservation and restored to the public domain to be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The *locus in quo* occurred on public lands which are not subject to the exclusive jurisdiction of the Federal Government or the Colville Indian Tribe and which are subject to the exclusive jurisdiction of the State of Washington. *U. S. v. Pelican*, 232 U.S. 442 (1914).

CONCLUSION

For the foregoing reasons, respondent State of Washington submits that its motion to dismiss or affirm should be granted.

Respectfully submitted:

SLADE GORTON,
Attorney General,

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General,

Attorneys for Respondent.

January 18, 1974

[5] 82 Wn.2d at 451, insert by author.
[6] The State of Washington was admitted into the Union in 1889.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-717

ALEXANDER J. ANTOINE AND IRENE F. ANTOINE, HIS WIFE, APPELLANTS

v.

THE STATE OF WASHINGTON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of February 19, 1974, inviting the Solicitor General to express the views of the United States in this case.

1. Alexander Antoine and his wife, Irene, were convicted in the courts of the State of Washington for shooting and killing a deer out of the state hunting season. Their defense was that they killed the deer on land within the boundaries of the original Colville Indian Reservation on which they have the right to hunt subject only to tribal or federal regulation.[1] Mr.

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[1]The status of the southern half of this reservation was the subject of *Seymour* v. *Superintendent*, 368 U.S. 351. This case, as explained within, concerns residual rights in the northern half.

Antoine is an enrolled member of the Colville Confederated Tribes, which are recognized by the United States government. Mrs. Antoine is a Canadian Indian and is not enrolled in the United States.[2]

By Executive Order of July 2, 1872 (1 Kapp. 915) President Grant established a reservation for Indian tribes which subsequently formed the Colville Confederated Tribes. Pursuant to an Act of August 19, 1890, 26 Stat. 355, a commission was appointed by the President to negotiate with the Tribes for "the cession of such portion of said reservation as said Indians may be willing to dispose of * * *." The commission entered into an agreement with the Tribes dated May 9, 1891 (J.S. App. F) in which the Tribes surrendered to the United States (Article I) " * * * * all their right, titles, claim and interest in * * *" (J.S. App. F, F1) a tract of land constituting approximately the northern half of the reservation. Article 6 of the agreement stated that " * * * * the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (*id.* at F4). Article 12 provided that the agreement "shall go into effect from and after its approval by Congress" (*id.* at F7). The other articles in the agreement gave the Indians various rights, including a right to allotments on the ceded land, and a cash payment of $1,500,000, in five installments.

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[2]The State does not contest that both Mr. and Mrs. Antoine are entitled to the rights of members of the Colville Tribes on the property in question, but argues that such rights do not encompass hunting free of state regulation. See J.S. App. A, A1, A3-A4.

Congress, in 1892 (Act of July 1, 1892, 27 Stat. 62), did not approve the agreement but enacted many of its provisions. In particular, the northern half of the reservation was "vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians," and was "open[ed] to settlement * * * [to be] disposed of under the general laws applicable to the disposition of public lands in the State of Washington" *(id.* at 63). Article 6 of the 1891 agreement, securing the right to hunt and fish, and Article 11, providing a consideration of $1,500,000 for the land sold, were omitted from the Act (J.S. App. F).

By Act of June 21, 1906, 34 Stat. 325, 377-378, Congress authorized the payment of $1,500,000 for the land ceded to the United States under the 1891 agreement and the 1892 Act. The 1906 Act stated, *inter alia,* that payment of the money was "[t]o carry into effect the agreement [dated May 9, 1891] entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States * * *." The $1,500,000 authorized in the 1906 Act was actually appropriated for the Indians in five subsequent Acts, each providing $300,000: 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1074. Each of these statutes is essentially identical and provides that the appropriation is:

> In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by an

> Act of Congress "To provide for the opening of a part of the Colville Reservation in the State of Washington, and for other purposes," approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, *ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one,* * * *. [34 Stat. 1015, 1050-1051; emphasis added.]

In affirming appellants' conviction, the Supreme Court of the State of Washington held that the 1891 agreement was a mere contract between the Indians and the United States, which does not bind the State of Washington (J.S. App. A, A13). The court also held that the agreement, even if enforceable against the State, was not intended to exempt the Indians from state game laws *(ibid.)*.

We disagree with the decision of the Supreme Court of the State of Washington on both questions.

2. The agreement of May 9, 1891, was not self executing, but by its terms was to become effective "* * * from and after its approval by Congress" (J.S. App. F, F7). There is thus no question in this case of enforcing a bare agreement against a non-party. The question is whether the agreement was approved or ratified by Congress and thus became a law binding on the States. U.S. Const., Art. VI, cl. 2; see *Perrin* v. *United States*, 232 U.S. 478.[3]

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[3]Washington, in assuming limited jurisdiction over Indians under Public Law 83-280, 67 Stat. 588, enacted RCW 37.12.060 which states:

> Nothing in this chapter * * * shall deprive any Indian or any Indian tribe, band, or community of any right, privilege,

Following the signing of the 1891 agreement, the House of Representatives voted to ratify the agreement, with certain changes. In particular, the House bill replaced the $1,500,000 lump sum payment called for in the agreement with a payment of $1.25 per acre, to be paid to the credit of the Indians as the land would be opened for homesteading. The bill explicitly preserved the hunting and fishing rights guaranteed in the agreement. 23 Cong. Rec. 3840.

The Senate contested the Indians' title to a reservation created by executive order and expressed unwillingness to pay for what was being taken. See S. Rep. No. 664, 52d Cong., 1st Sess., p. 2. The Senate bill, which eventually became the Act of July 1, 1892, provided that the money from the sale of the land be at the disposition of Congress and made no mention of the hunting and fishing rights preserved in the agreement.

Fourteen years later, Congress, in the Act of June 21, 1906, 34 Stat. 325, 377-378, authorized payment of $1,500,000 expressly "[t]o carry into effect the agreement bearing the date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States * * *." One reason for this changed position was that Congress wanted to open up the southern half of the original reservation for non-Indian settlement but the Tribes refused to consent until the agreement for the

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or immunity afforded under federal treaty, *agreement*, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof. [Emphasis supplied.]

northern half was kept. Another reason, however, was that the Congress of 1906 was keenly aware of the government's breach of faith with the Indians in failing to honor the 1891 agreement and wished to correct the situation. Accordingly, the Act of June 21, 1906, was enacted. See S. Rep. No. 2561, 59th Cong., 1st Sess., pp. 134-135. Later in the same session, in appropriating $300,000 of the authorized funds, Congress expressly referred to the 1906 Authorization Act as an Act "ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one" *(supra,* p. 4). The authorization Act of 1906 and the subsequent appropriations Acts, in our view, constitute congressional ratification of the 1891 agreement.[4]

3. If the Court agrees with our view that Congress ratified the 1891 agreement, the question becomes whether that agreement affords appellants the right they claim. Article 6 of the agreement states "that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (J.S. App. F, F4).

---

[4]In *Confederated Tribes of the Colville Reservation* v. *United States,* Docket No. 181-C pending before the Indian Claims Commission, the United States, relying upon the language of the Act of June 21, 1906, but not the subsequent appropriations Acts, argued that the 1906 Act did not constitute a ratification of the 1891 agreement. Considering the Acts together, we now conclude to the contrary (and are so informing the Commission, while preserving our right to rely in that case upon the possibility that this Court in the present case may disagree with us). See *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 293; *Fleming* v. *Mohawk Wrecking & Lumber Co.,* 331 U.S. 111, 116, in which less specific language was considered ratification of Presidential acts. See also *Perrin* v. *United States,* 232 U.S. 478, 480; *Squire* v. *Capoeman,* 351 U.S. 1-7.

In *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 *(Puyallup I),* this Court construed a clause in the Treaty of Medicine Creek (10 Stat. 1132-1133) which stated:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * *.

The Court, quoting from *United States* v. *Winans,* 198 U.S. 371, stated (391 U.S. at 397):

> To construe the treaty as giving the Indians "no rights but such as they would have without the treaty" * * * would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

As a result, the Court held that (391 U.S. at 398):

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State * * *. But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State *in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.* [Emphasis added.]

"Appropriate standards" refers to a showing that the regulation is a reasonable and necessary conservation measure. See *Tulee* v. *Washington,* 315 U.S. 681, 684; *Department of Game* v. *Puyallup Tribe (Puyallup II),* 414 U.S. 44. As this Court noted in *Puyallup I, supra,* 391 U.S. at 402, n. 14, the

standard to be applied is more stringent than the usual federal constitutional standard concerning the scope of the police power of a state. The special rights of the Indians must be accommodated, so long as consistent with preservation of the game in question. See also *Menominee Tribe* v. *United States,* 391 U.S. 404.

The State of Washington has not shown that the prevention of out of season hunting of deer on the land in question by beneficiaries of the rights of the Colville Tribes is in any way necessary or even useful for the conservation of deer—and the interests of conservation often are served by the thinning of a herd. Nor has the State shown whether, if some regulation is desirable, the taking of deer by Indians for private consumption need be prohibited. We therefore agree with appellants that their criminal conviction was invalid.

CONCLUSION

The case presents a substantial federal question; probable jurisdiction should be noted or, in the alternative, the judgment should be reversed.

Respectfully submitted.

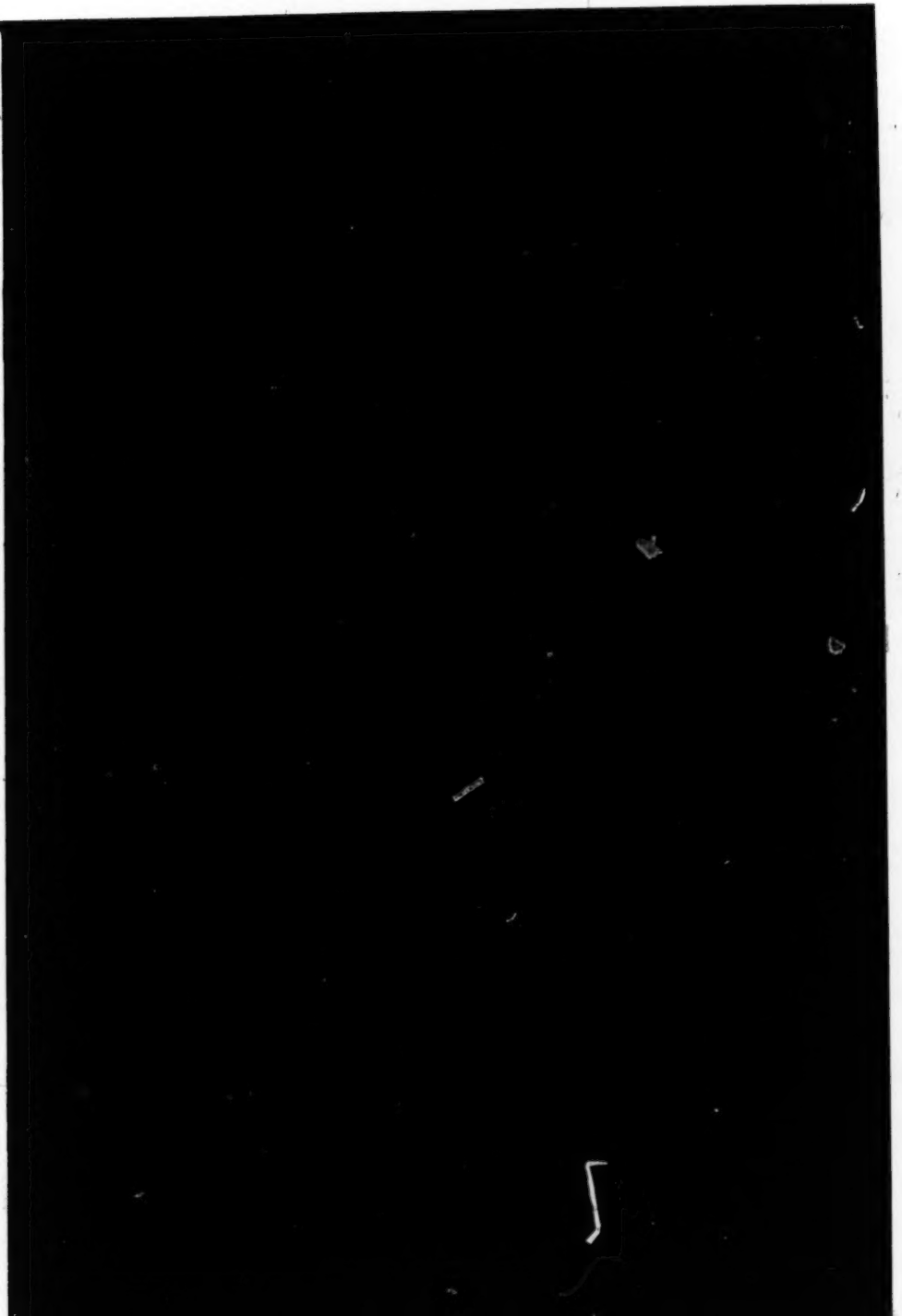
ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

EDMUND B. CLARK,
EDWARD J. SHAWAKER,
Attorneys.

MAY 1974.



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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-717

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Appellants,
v.
THE STATE OF WASHINGTON,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

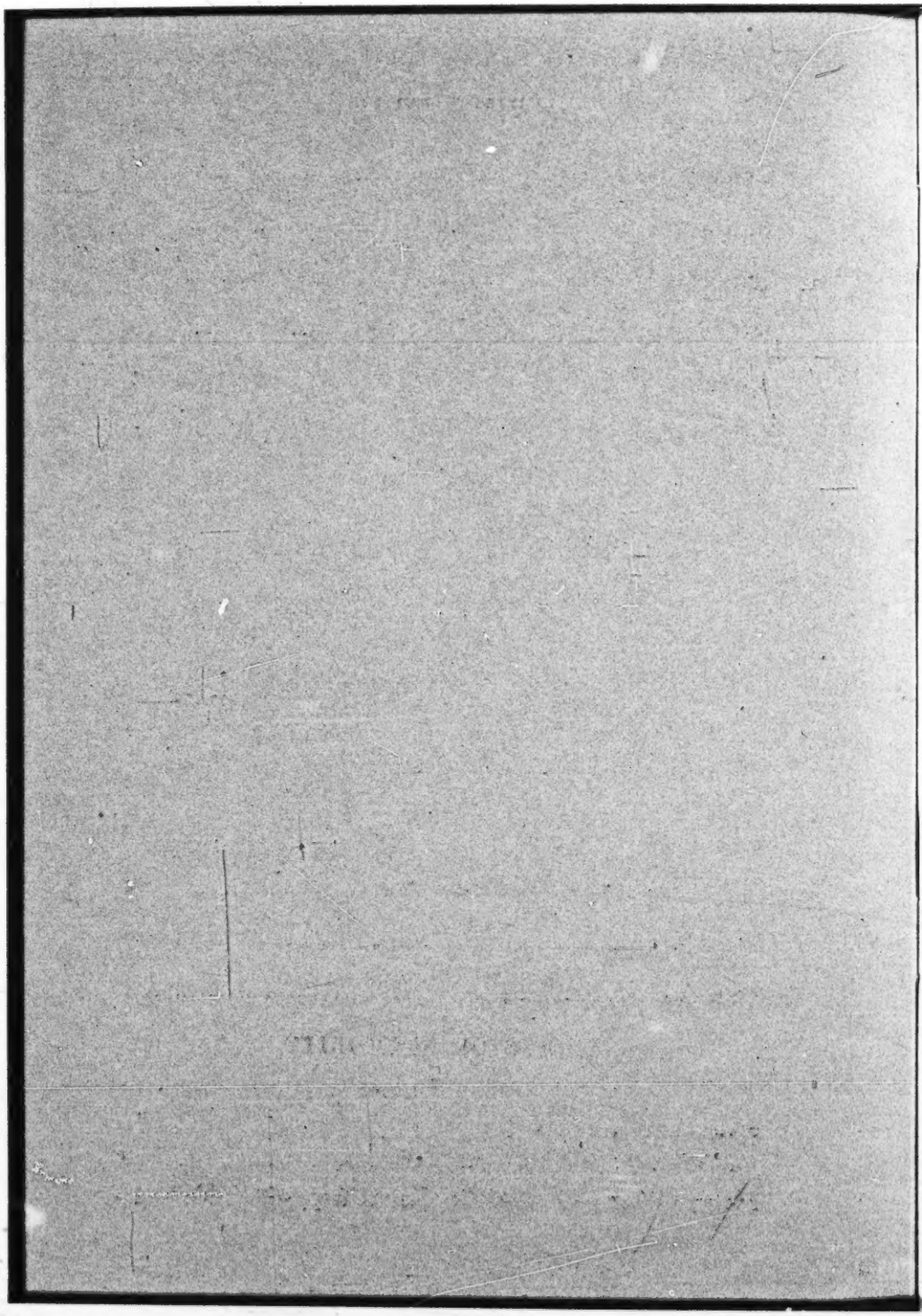
BRIEF OF APPELLANTS

ZIONTZ, PIETILE, MORISSET
& ERNSTOFF
By MASON D. MORISSET
Attorneys for Appellants

Office and Post Office Address:
3101 Seattle-First National
Bank Building
Seattle, Washington 98154
Telephone (206) 623-1255

August, 1974

CHAPTMAN & BELT PRESS — SEATTLE, WASHINGTON



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Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANTS

Appellants, who are Indians, were convicted of violating game laws of the State of Washington. They appeal from the Judgment of the Supreme Court of the State of Washington, entered July 12, 1973, confirming the judgment of conviction in the Superior Court for Ferry County, State of Washington, Cause No. 4859, signed and entered by the Honorable Richard J. Ennis on May 16, 1972, and filed May 18, 1972.

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported at 82 Wn.2d 440, 511 P.2d 1351 (1973), and is

reprinted in the Single Appendix at page 18. The Superior Court's findings, judgment and sentence are not reported, but are reprinted in the Single Appendix at pages 12 and 15. The judgment appealed from (being the Remittitur of the State Supreme Court dated August 12, 1973) is reprinted in the Single Appendix at page 36.

JURISDICTION

Alexander Antoine, a Colville Indian, shot a deer on land which was formerly part of the Colville Indian Reservation. Mr. Antoine and his wife Irene were charged with violation of state laws which prohibit taking and possession of deer during closed seasons.

They were tried, convicted and sentenced to jail terms. A timely appeal was taken to the State Supreme Court. On July 12, 1973, that court affirmed and expanded the decision of the trial court by rendering a written opinion upholding the lower court's decision.[1]

On August 12, 1973, the Washington Court issued its Remittitur[2] to the trial court, which is the judgment enforcing its written opinion.[3]

On September 19, 1973, appellants filed in the Washington Supreme Court, a notice of appeal to the Supreme Court of the United States.[4]

Jurisdiction of the Supreme Court to review the judgment below by direct appeal is conferred by 28 U.S.C. § 1257(2) which reads in part:

1. Single App. p. 18.
2. Single App. p. 36.
3. RCW 2.04.170, Supreme Court Administrative Rules, Rule 15.
4. R. 84.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Metlakatla v. Egan*, 369 U.S. 45 (1962);[5] *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942).

QUESTIONS PRESENTED

1. Where an Indian tribe cedes lands of its reservation to the United States by agreement, may the federal government reserve hunting rights for the Tribe in the ceded area?

2. When former Indian lands become part of a state, does the state take the land subject to rights previously reserved on such lands for Indians by the United States?

3. Did the federal government by the agreement of 1891 and the act of June 21, 1906, reserve hunting rights to the Colville Indians on their former reservation?

4. Where the United States has declared that hunting rights of the Colville Indians "in common with all other

5. *Metlakatla* is analogous to the present case. There, the Indians claimed that they were immune from state wildlife laws as applied to them on the grounds that such laws were repugnant to the Supremacy Clause, federal statutes and secretarial orders. Here, appellants allege that state law is repugnant to the Supremacy Clause, federal statutes and executive orders. *Metlakatla* held that appeal was the appropriate remedy. *Metlakatla, supra*, p. 50.

persons . . . shall not be taken away or in any wise abridged," may the State of Washington abridge, impair or regulate such rights?

STATUTES AND FEDERAL LAWS INVOLVED

United States Constitution, Article 1, section 8, clause 3 (Indian Commerce Clause).[6]

United States Constitution, Article VI, clause 2 (Supremacy Clause).[7]

Executive Order of July 2, 1872 (1 Kapp. 916).[8]

Agreement of 1891.[9]

Act of June 21, 1906, 34 Stat. 325, at 377 (3 Kapp. 193, at 245).[10]

Act of March 1, 1907, 34 Stat. 1015, 1050-1051 (3 Kapp. 266, 302).[11]

Revised Code of Washington, Section 77.16.020[12] and Section 77.16.030.[13]

STATEMENT

On September 11, 1971, Alexander Antoine and his wife, Irene,[14] shot and killed a deer in what is now Ferry County, Washington. On that date, the hunting season for deer in

6. App., p. A-1.
7. App., p. A-1.
8. Single App., p. 3.
9. Single App., p. 4.
10. App., p. A-1.
11. App., p. A-2.
12. App., p. A-2.
13. App. p. A-3.
14. Irene Antoine is also an Indian, but not an enrolled member of the Confederated Tribes.

that particular area was closed.[15] The area in which the deer was shot, however, was within the boundaries of the original Colville Indian Reservation as established by an 1872 Executive Order.[16]

The Colville Confederated Tribes comprise eleven separate tribes and bands of Indians who formerly occupied large areas of Western Washington. They were placed on the Colville Indian Reservation in 1872 by Executive Order of the President.[17] The tribes are recognized by the United States Government, Bureau of Indian Affairs and are governed by a Constitution and By-Laws approved by the Secretary of the Interior on December 26, 1938. Of the 5,340 enrolled members of the tribes, approximately half live on the Colville Indian Reservation which encompasses 1.3 million acres and is governed by the 14-member Colville Business Council. Alexander Antoine is an enrolled member of the Tribes.[18]

The land involved in this case had been ceded back to the United States Government by the various bands and tribes of the Colville Confederation by agreement with the United States in 1891.[19] That agreement provided in part:

> It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely

15. R. 50.

16. R. 50.

17. Executive Order of July 2, 1872; (1 Kapp. 916), Single App. p. 3.

18. R. 51.

19. Single App., p. 4.

> to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the *right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.*[20]
>
> (Emphasis supplied.)

The agreement was ratified by statute in 1906. 34 Stat. 325.[21]

Mr. Antoine and his wife were cited by a State of Washington game protector for shooting and possessing deer in violation of the Washington State game laws.[22]

They were tried in Ferry County District Court on October 18, 1971, and found guilty as charged in an opinion filed by the District Court Judge on November 1, 1971.[23]

Pursuant to state law, Alex Antoine and his wife filed a timely Notice of Appeal to the Superior Court for trial *de novo*.[24]

Trial was held January 14, 1973, before the Honorable Richard J. Ennis, resident judge of the judicial district composed of Lincoln County, State of Washington, sitting *pro tem* for the Ferry County Superior Court, Republic, Washington.[25]

After trial on stipulated facts,[26] appellants' conviction

20. Single App., p. 7.

21. App., p. A-1, (see discussion, *infra*, p. 14).

22. RCW 77.16.020 and 77.16.030. App., p. A-2, 3.

23. District courts are county courts of limited jurisdiction in the State of Washington. See RCW 3.66.060.

24. Superior courts are state courts of general jurisdiction (RCW 2.08.020) to which appeals from districts courts may be made.

25. R. 5.

26. R. 7-9.

for hunting and possession of deer out of season was upheld by the Superior Court, holding that:

> These Indians are bound by the 1891 Agreement which gave the Indians the right to hunt and fish in common with all others. Now, this simply means that the defendant is bound by the state conservation laws as all others are bound.[27]

Judgment and sentence were filed May 19, 1972, finding Mr. Antoine guilty as charged, sentencing him to 30 days, 25 suspended, and his wife, Irene, to 30 days suspended, with one year probation.[28]

Appeal was taken to the Supreme Court of the State of Washington which rendered its Opinion on July 12, 1973, the Court holding that "the Agreement before us . . . is not the supreme law of the land. . . ."[29] and ". . . the federal government was not authorized to curtail the state's right to exercise its police power, . . ."[30]

The Remittitur of the State Supreme Court was filed August 12, 1973, and is hereby appealed from.[31]

At all times in this proceeding, appellants have maintained that the state game laws as applied to them were repugnant to federal law. Specifically, they have maintained that the 1891 agreement constitutes the supreme law of the land and that state game laws must give way to the promises and guarantees of the federal government.

27. R. 24-25.

28. R. 53-54.

29. Single App., p. 30 (82 Wn.2d 440 at 451).

30. Single App., p. 21 (*Op. cit.*, at 443).

31. Single App., p. 36.

SUMMARY OF ARGUMENT

1. Establishment of the Colville Indian Reservation by executive order vested substantial hunting rights in the Colville Tribes. *Menominee v. United States*, 391 U.S. 404 (1968). Those substantial rights are subject to tribal control and the State may not regulate or interfere with the Tribes' exercise of its sovereign power over fishing and hunting affairs within its Reservation. *See, Moore v. United States*, 157 F.2d 760 (9th Cir. 1946) *cert. denied*, 330 U.S. 827 (1947); *Hunt v. United States*, 278 U.S. 96 (1928); *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925). Such rights continue unless explicitly abrogated or terminated by the Congress. *Menominee v. United States*, 391 U.S. 404 (1968).

2. In 1891, half of the Colville Reservation (*i.e.* the northern half) was ceded back to the United States government by an Agreement which provided that the right to hunt and fish on the ceded land ". . . shall not be taken away or in anywise abridged." This Agreement was ratified in 1906 (34 Stat. 325, 377-378). The Agreement is part of the supreme law of the land and binding upon the State of Washington. U.S. Const. Art. VI, cl. 2; *See, Perrin v. United States*, 232 U.S. 478.

3. Agreements with Indians are never to be construed to their prejudice. Rather, how the Agreement would be understood by an unlettered people is the rule of construction. *Worcester v. Georgia*, 6 Pet. 515 (1832). In construing such agreements, one is to look only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence. *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). The words of the

1891 Agreement which provide that the Colville rights shall not be taken away or in anywise abridged mean that there is no residual state power or regulation over Indian rights. Regulation of the Colville hunting right would interfere with the exercise of Colville sovereign rights and power over tribal property, wildlife and natural resources and would not leave the tribe free from state jurisdiction and control. *McClanahan v. Arizona,* 411 U.S. 164 (1972).

4. Even if the 1891 Agreement is construed as allowing the state some residual power to regulate Indian hunting as "necessary for conservation" (*See, Puyallup Tribe v. Department of Game,* 391 U.S. 392 (1968), the State's burden in that regard has not been met. To regulate an Indian hunting right, the state must deal with the matter of Indian rights as a subject separate and distinct from that of fishing by others. It must establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for conservation and that the proposed regulation is the least restrictive which can be imposed consistent with conservation needs. The burden of such facts is on the state. It must regulate the taking of game so that Indians exercising Indian rights will be accorded an opportunity to take, at their usual and accustomed places by means reasonably feasible to them, a fair and equitable share of the resource. *See, Sohappy v. Smith,* 302 F.Supp. 899 (D.C. Ore. 1969) and *United States v. Washington* (D.C. W.D. Wash., Cause No. 9213), Federal Court interpretations of the rule announced in *Puyallup Tribe v. Department of Game, supra,* (Puyallup I). A State regulation which does not recognize superior Indian rights guar-

anteed by federal law in fact discriminate against those Indians. *Department of Game v. Puyallup Tribe,* 414 U.S. 44 (Puyallup II) (1972).

ARGUMENT

This case is of importance not only to Alex and Irene Antoine but to the 500 or more Colville families who live on or near the reservation, many of whom depend upon game for a food source. The action of the state game department and the decision of the Court below destroy vested hunting rights on former reservation lands of these Indians, and throw a cloud on the legality of one of the agreed-on terms of the 1891 Cession Agreement and thus the entire legality of the Cession itself.

The principles announced by the Court below have great significance in the continuing federal-state relationship affecting Indian affairs in the state of Washington. If allowed to stand, they will seriously affect the ability of the federal government to carry out its trust responsibility with regard to its Indian wards in the state.[32]

The principle announced by the state court relegates all federal actions, be they Executive Orders, agreements, statutes, etc., undertaken after the end of the treaty-making power in 1871, to a second class position in federal law. The principles enunciated allow the state court to construe and interpret such federal law according to rules and

32. Virtually every one of the 30-plus tribes and bands in the state of Washington trace their current rights and guarantees to post-1871 federal actions or agreements. For example, the Makah Indian Reservation was established by Executive Order in 1872, 1 Kapp. 917; the Lummi Indian Reservation was established by Executive Order in 1872, 1 Kapp. 917; the Moses Band of Indians and some of the Colville Bands relinquished their previous reservation by agreement in 1883. (23 Stat. 79).

guidelines not heretofore applicable to Indian statutes and agreements.

Those rules and guidelines seriously erode the protection of Indian rights under federal law and, of course, directly block the exercise of federally guaranteed hunting rights by Alex Antoine and other members of the Colville Confederated Tribes.

1. Establishment of an Indian Reservation Vests Hunting Rights in an Indian Tribe Which Are Not Subject to State Control

Alex Antoine's hunting rights in eastern Washington predate, of course, any federal statutes or actions. Agreements made with Indian tribes during the years of western expansion are instruments which recognize and affirm such rights and not instruments which constitute a grant of rights *to* the Indians. *U.S. v. Winans*, 198 U.S. 371, 381 (1905). Before any agreements were made with the Colville Confederated Bands and Tribes, or any reservation set aside for them, hunting was a major source of food and a major activity.[33]

Treaties were never signed with many of the tribes and bands of the interior areas of the state of Washington, including the Okanogan Band of which Mr. Antoine is a member. However, continuing problems between the Indians and settlers and the advance of railroads, etc., led to the removal of many of these bands to reservations in the 1870's.[34]

33. TEIT & BOAS; THE SALISHAN TRIBES OF THE WESTERN PLATEAUS, 45th B.A.E. Annual Report, 1927, (facsimile reproduction by Shorey Bookstore, 1973) at p. 237 and 242.

34. See TEIT & BOAS; *supra*, p. 259. See also; *Report of the Commissioner of Indian Affairs for 1872:* reprinted in WASHBURN, ED, THE AMERICAN INDIAN AND THE UNITED STATES—A DOCUMENTARY HISTORY, Vol. 1, p. 176-179, Smithsonian Institution, Random House, 1973.

Thus, in 1872, the Colville Indian Reservation was established for the use and occupancy of the Methows, Okanogan, San Poil, Lake, Colville, Kalispell and other bands by the President of the United States.[35]

The reservation included an area of more than 3 million acres south of the Canadian border, east of the Okanogan River and north and west of the Columbia River, lying in what is now the eastern half of Okanogan County, all of Ferry County and the northwestern corner of Stevens County in the state of Washington.

It has long been the rule that rights granted or reserved to Indians by the establishment of a reservation by Executive order are as secure and as entitled to paramount protection as are rights reserved by treaty. *Spalding v. Chandler*, 160 U.S. 394 (1896), and *Federal Indian Law*, pages 614-616.[36]

The instrument establishing the reservation need not specifically enumerate hunting rights for such rights to exist. Where no specific mention of the right to hunt and fish was made, ". . . such a reservation was not necessary to preserve the right on land reserved or retained in Indian ownership. The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, . . . remains in them unless granted away." *Federal Indian Law*, 496-498, citing Op.

35. Executive Order of July 2, 1872, 1 Kapp. 916 reprinted in Single App., p. 3. Note: The reservation was originally established by Executive Order of April 9, 1872, but that reservation was superseded by the later order of July 2.

36. *Federal Indian Law*, 1958, is a revision of the *Handbook of Federal Indian Law*, prepared by the office of the United States Solicitor under the editorial direction of Felix S. Cohen, Assistant Solicitor, and first printed in 1940. References in this brief are to the 1966 reprinting by the Association on American Indian Affairs, Inc. of the 1958 revision of the *Handbook*.

Act. Sol. M.28107, June 30, 1936. Thus it has been held that where land is merely set aside for Indian use and occupancy, there being no specific mention of hunting or fishing rights, those rights nevertheless are included in the reservation. *Menominee v. United States,* 391 U.S. 404 (1968), *Kimball v. Callahan,* 493 F.2d 564 (1974).

Finally, a tribe possesses full powers of internal sovereignty except as limited by treaty or Act of Congress, *Barnes v. United States,* 205 F.Supp. 97, 100 (D. Mont., 1962); *Federal Indian Law,* 396, 398, and therefore has the power to regulate tribal property (including hunting and fishing rights) and the conduct of its members concerning such property and rights. *Federal Indian Law,* 441.

Tribes may exclude non-members from the reservation and thereby close all portions of the reservation to hunting and fishing by non-Indians. ". . . [T]he tribe has the sovereign power of determining conditions upon which persons shall be permitted to enter its domain, . . ." *Federal Indian Law,* 439, citing 55 I.D. 14, 50 and *Morris v. Hitchcock,* 194 U.S. 384 (1904). *Quechan v. Rowe,* 350 F. Supp. 106 (1972).

Thus the establishment of the Colville Reservation by the Executive Order of 1872 recognized and vested substantial hunting rights in the Colville Confederated Tribes.

The nature and scope of the Indian rights to wildlife on a reservation is nearly absolute *vis-a-vis* the state. A state has no authority to interfere with hunting on federal lands. *Hunt v. United States,* 278 U.S. 96 (1928). Wildlife on a reservation belongs to the Indians as their property. *Mason v. Sams,* 5 F.2d 255 (W.D. Wash., 1925); *Pioneer Packing v. Winslow,* 159 Wash. 655 (1930). Within a res-

ervation, Indians are exempt from state conservation regulations. *Moore v. United States,* 157 F.2d 760 (9th Cir., 1946), *cert. denied,* 330 U.S. 827 (1947). *Kimball v. Callahan,* 493 F.2d 564. And, of course, it is a federal crime to hunt on Indian lands without permission of the Indian owners. 18 U.S.C. § 1165. The state may not interfere with tribal attempts to regulate on-reservation hunting. *Quechan v. Rowe,* 350 F. Supp. 106 (1972).

Clearly, establishment of the Colville Reservation vested substantial and far-reaching hunting rights in the Colville Indians, over which the State of Washington has no control or authority absent relinquishment of those rights by the Indians or abrogation of such rights by the Congress.[37]

2. Colville Hunting Rights on the North Half Are Protected From State Regulation by Federal Law

a. *The 1891 Agreement Between the Federal Government and the Colville Tribes Is the Supreme Law of the Land*

Not long after the Colville Reservation was established, it became the policy of the United States government for a time to purchase as much Indian land as possible and open it to settlement by non-Indians.[38]

In 1890, a commission was formed by congressional act and empowered to negotiate with the Colville Confed-

37. At the time that the rights vested, i.e., 1872, Washington was not yet a state. However, the subsequent fact of statehood does not change the authority or control of the state. A state must accept statehood subject to whatever outstanding rights and guarantees exist at the time of statehood. See *United States v. Winans,* 198 U.S. 371 at 382-84 (1905). See also *Coyle v. Smith,* 321 U.S. 559, 570 (1911) and *Johnson v. Geralds,* 234 U.S. 442, 438-40 (1914); *Metlakatla v. Egan,* 369 U.S. 45, 59 (1962).

38. See, e.g., *Reports of the Commissioner of Indian Affairs for 1890:* reprinted in WASHBURN, *supra,* at p. 435, *et seq.*

erated Tribes concerning ". . . the cession of such portion of said reservation as said Indians may be willing to dispose of . . ." (Act of August 19, 1890, 26 Stat. 355).

Negotiations were carried out[39] and an agreement of sale was entered into on May 9, 1891.[40]

The agreement provided that the Indians would ". . . surrender and relinquish to the United States all their rights, title, claim and interest in and to and over. . . ." approximately 1.5 million acres of the original reservation.[41]

Although the House of Representatives voted to ratify the 1891 agreement (see 23 Cong. Rec. 3840), the Senate rejected the explicit terms of the agreement evidently because of the misconception that the Indians did not have complete title to the reservation. See S. Rep. No. 664, 52d Cong., 1st Sess., page 2. Thus, instead of the 1891 agreement, the Act of July 1, 1892 (27 Stat. 62), was enacted. This Act enacted many of the provisions of the Agreement and provided that the northern half of the Reservation was "vacated and restored to the public domain. . . . (and) opened to settlement. . . ."

Subsequently, however, after much agitation by both the Indians and the Bureau of Indian Affairs,[42] the Con-

39. See Antoine exhibits Nos. 1 and 3, "Minutes of Negotiations." Admitted to evidence, R. 9.

40. Defendants' Exhibits 2 and 4, admitted to evidence, R. 9. See Single App., p. 4.

41. The land so ceded was north of approximately the 48°30' parallel of latitude and south of the Canadian border, generally referred to as the "north half" of the Colville Reservation.

42. The 15-year lobbying attempt of the Indians is outlined in *Butler and Vale v. U.S.*, 43 Ct. Claims Rep. 497 (1908).

gress authorized payment as provided in the 1891 Agreement, noting that the payment was to ". . . carry into effect the Agreement (dated May 9, 1891) entered into between the Indians residing on the Colville Reservation and the Commissioners appointed by the President of the United States. . . ." Act of June 21, 1906 (34 Stat. 325, 377-378) The money authorized in the 1906 Act was appropriated in five subsequent Acts of $300,000 each: 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1074. Each of these statutes is essentially identical and provides that the appropriation is:

> In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by an Act of Congress "To provide for the opening of a part of the Colville Reservation in the State of Washington, and for other purposes," approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one. . . .

34 Stat. 1015, 1050-1051.

A congressional Act relating to Indians is the supreme law of the land, binding on the states. U.S. Const., Art. VI, cl. 2; see *Perrin v. United States*, 232 U.S. 478.[43] Thus the

43. Washington, in assuming limited jurisdiction over Indians under Public Law 83-280, 67 Stat. 588, enacted RCW 37.12.060 which states:

> Nothing in this chapter * * * shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, *agreement*, statute, or Executive Order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof.
> [Emphasis supplied.]

1891 Agreement is binding on the State of Washington.[44]

The 1871 Act ending the treaty power with respect to Indian tribes (23 Stat. 79, 25 U.S.C. §71), did not affect the federal government's exclusive jurisdiction over the Indian tribes, but was only a decision to govern its Indian wards by congressional enactment rather than by treaty. *United States v. Kagama*, 118 U.S. 375, 30 L. Ed. 228, 6 S. Ct. 1109 (1866). The historical circumstances, which made exclusive federal jurisdiction over the Indians necessary, preclude any notion of residual state powers. See *State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 183 (1960).

Where the federal authority over Indian affairs is already lodged in the federal government it will not be dislodged by a statehood act. See *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 59 (1962).

Agreements made with Indian tribes subsequent to the end of the Indian treaty-making power in 1871 and after a

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44. Note that the state argues in its Motion to Dismiss or Affirm that the Colville Reservation was "diminished" by the Act of July 1, 1892. (27 Stat. 62). Whether the reservation was diminished or not seems inapposite here. First, the 1906 Act ratifying the 1891 Agreement, being later than the 1892 Act, clearly supersedes that Act. Secondly, the 1892 Act makes no mention of fishing and hunting rights. Vested fishing and hunting rights of Indians on their reservations are not impaired or abrogated by implication, but must be explicitly terminated by the Congress. *Menominee v. United States*, 391 U.S. 404. The 1892 Act, being silent on the subject can therefore have no effect on fishing and hunting rights. The question of "diminishment" of the reservation by the 1892 Act was discussed in the context of legislation dealing with the present south half of the reservation in *Seymour v. Superintendent*, 368 U.S. 351, and again, tangentially, in *Mattz v. Arnett*, 412 U.S. 481, footnote 22. The other party to the Agreement (i.e., the United States) agrees to its ratification and status as supreme law. See Memorandum for the United States as Amicus Curiae, p. 6. The state, at no time, has contested this view but rather has simply claimed that the agreement is not a "treaty." Mot. to Dismiss, p. 6.

state is admitted to the Union are nevertheless binding and supercede state law.[45] *Dick v. United States*, 208 U.S. 340 (1908).

b. *The "Plain Meaning" of the 1891 Agreement Is That the State of Washington Has No Power to Abridge Colville Hunting Rights*

This Court has provided us with principles to be used in construing agreements with the Indians.

Thus, it has been held:

> The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people rather than their critical meaning should form the rule of construction.

Worcester v. Georgia, 6 Pet. 515 (1832).

It has further been noted that:

> The parties were not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

Choctaw Nation v. United States, 119 U.S. 1, 28 (1886); see also *Menominee Tribe v. United States*, 391 U.S. 404, 406 n. 2 (1968).

In *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (*Puyallup I*), this Court construed a clause in the Treaty of Medicine Creek (10 Stat. 1132-1133) which stated:

> The right of taking fish, at all usual and accustomed

45. Washington was admitted to the Union in 1889, two years before the Agreement.

> grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * *.

The Court, quoting from *United States v. Winans*, 198 U.S. 371, stated (391 U.S. at 397):

> To construe the treaty as giving the Indians "no rights but such as they would have without the treaty" * * * would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

As a result, the Court held that (391 U.S. at 398):

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State * * *. But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State *in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.* [Emphasis added.]

"Appropriate standards" refers to a showing that the regulation is a reasonable and necessary conservation measure. See *Tulee v. Washington*, 315 U.S. 681, 684; *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44. As this Court noted in *Puyallup I, supra*, 391 U.S. at 402, n. 14, the standard to be applied is more stringent than the usual federal constitutional standard concerning the scope of the police power of a state. The special rights of the Indians must be accommodated, so long as consistent with preservation of the game in question. See also *Menominee Tribe v. United States*, 391 U.S. 404.

In the present case, however, an analysis of the words of the particular agreement involved and the particular facts of this case leads to the conclusion that there is no

power in the State to regulate the Colville's hunting rights at all. [46]

The *Puyallup* case involved the Treaty of Medicine Creek (10 Stat. 1132-1133) which guaranteed the right to fish and hunt on ceded lands with the following language:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory. . . .

The 1891 Agreement with the Colvilles on the other hand, guarantees hunting rights in the ceded areas with the following language:

> . . . the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.

(Single Appendix, p. 7)

The language of the 1891 Agreement obviously adds significant protections for the Indian hunting rights. It has the important proviso that the right shall not be "taken away" or "in anywise abridged."

Certainly to close hunting is to "take away" a hunting right. Likewise, anything which in any way reduces, limits, negates, abrogates, or impairs a right is an "abridgement".

To "abridge" clearly means to deprive, to diminish by reducing, to shorten in duration, or cut down in extent. *Websters Third New International Dictionary,* 6 (Unabridged, Ed. 1962). The word "anywise" means "in any way or matter whatsoever: at all," *Websters, supra,* p. 98.

46. The standards announced in Puyallup have been criticized. See *Burnett, Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy,* 7 Idaho Law Review, 49, 68 (1970) and Johnson, *The States v. Indian Off-Reservation Fishing: A United States Supreme Court Error,* 47 Wash. Law Review, 207, 235 (1972).

In a case decided subsequent to *Puyallup I, supra,* the Michigan court found no State power to regulate Indian fishing rights where the treaty in question contained additional language. *People v. Jondreau,* 185 N.W.2d 375, 384 Mich. 539 (1971). The treaty in question in *Jondreau* provided that the Indians ". . . shall have the right to hunt and fish therein (that is, the ceded area) until otherwise ordered by the President." The Michigan Supreme Court found the words "until otherwise ordered by the President" sufficient to preclude any residual State power or regulation over Indian rights.

Secondly, the underlying rationale of *Puyallup I* (391 U.S. 392) appears to be that there is ". . . no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State . . ." so that the "overriding police power of the State, . . . is preserved." *Puyallup, supra,* pp. 398-399.

Yet State regulation of the Colville hunting right will surely interfere with the power of the tribal government over tribal property and tribal affairs.[47]

Clearly the reservation of hunting rights on the old north half constitutes the reservation of an important tribal property right. The Colville Confederated Tribes are endeavoring to regulate that right and have passed an ordinance governing hunting and fishing on the north half. ..... Fed. Reg. ..... That ordinance provides that the resources to be managed primarily for the purpose of providing food and only secondarily for sport and recreation. The ordi-

47. The Business Council of the Colville Confederated Tribes is empowered by the Constitution of the Tribes in Article 5 "To protect and preserve the tribal property, wildlife and natural resources of the Confederated Tribes, ..."

nance provides for regulating areas, seasons and limits and penalties for violation. ..... Fed. Reg. .....[48]

Allowing State regulation over this important tribal right violates the policy of leaving Indians free from State jurisdiction and control. See *McClanahan v. Arizona*, 411 U.S. 164 (1973). In the present case attempted State regulation of the Colville hunting right clearly infringes on the right of the Confederated Tribes to make their own laws and be ruled by them. *McClanahan, supra*, p. 135.

c. *Denial of Alex Antoine's Hunting Rights Is Not Necessary for Conservation*

Assuming, in the alternative, that the State does have some power to regulate Mr. Antoine's hunting rights, that power has not been properly exercised in the present case.

The Federal District Courts charged with the responsibility of implementing the rule of *Puyallup I*[49] have formulated further principles to aid in that implementation.

Thus, in *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969), the court held that the State could regulate Indian rights only if it accomplished the following:

(a) It must establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the neces-

48. To aid enforcement it should be noted that the tribes maintain a force of game protectors who operate on the south half and a tribal court and tribal law and order code providing proper criminal procedures, etc., are in force.

49. 391 U.S. 392. "The right . . . may not be qualified by the State. . . . But . . . may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." at p. 398.

sary escapement of fish for conservation purposes: The burden of establishing such facts is on the State.

(b) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. . . .

(c) It must so regulate the taking of fish that the treaty tribes and their members will be accorded an opportunity to take at their usual and accustomed fishing places, by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run. (*Sohappy, supra,* p. 907)

This approach has been continued and expanded in a major case involving off-reservation fishing rights of the Western Washington Indian tribes. In *U.S., et al v. Washington, et al,* (W.D. Washington, Civil Cause No. 9213), the United States, on its own behalf and as trustee for several Washington Indian tribes brought suit against the State of Washington seeking a declaratory judgment and injunctive relief against the State of Washington as to application of its fish and game laws to the tribes. *U.S. v. Washington,* Final Decision, Feb. 12, 1974, p. 1.[50]

The case represents an attempt by the court to adjudicate the complex issue presented by State attempts to regulate Indian rights guaranteed by federal law.

In attempting to reconcile the concepts of Indian sovereignty and self-government, federally recognized hunting and fishing rights and the rulings of *Puyallup I* and *Puyallup II,* the Federal Court in *U.S. v. Washington* deter-

50. The Federal District Court's Opinion is not reported. A copy of the Final Decision has been lodged with the Clerk's Office. The Cause is presently on appeal to the Ninth Circuit.

mined that the tribes involved in that litigation were "entitled to exercise . . . governmental powers by regulating the treaty right fishing of its members without any State regulation thereof; provided, however, the tribe has and maintain the qualifications and accepts and abides by the conditions stated below." (*U.S. v. Washington*, Final Decision, p. 30) The court then went on to list (Final Decision, p. 31-34) the various qualifications and conditions each tribe would have to meet to regulate its off-reservation rights.[51]

Turning to the issue of State regulation of the off-reservation right, in absence of self-regulation by the tribe, the Federal Court then defined what "conservation" meant:

> However broadly the word may be used and applied in the theory and practice of fisheries science and management, 'conservation' as used in Supreme Court decisions and herein is limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish. In this context, as well as by dictionary definition, 'reasonable' means that a specifically identified conservation measure is appropriate to its purpose; and 'necessary' means that such purpose in addition to being reasonable must be essential to conservation.

U.S. v. Washington, Final Decision, p. 35.

The court then noted that the State had the burden of proof in the matter and that no regulation applied to an off-reservation treaty fishing right could be valid or enforceable unless and until it had been shown reasonable and necessary to conservation as above defined. p. 35.

51. These obligations include governmental, biological and enforcement capability, up-to-date tribal rolls and tribal-state cooperation.

The court then adopted the test outlined by the *Sohappy* court as noted above. (Final Decision, p. 42)

Clearly in the present case the State has not met its burden of proof. It has not, in the words of the *Sohappy* court, established "preliminary to regulation that the specific regulation is both reasonable and necessary for conservation" or that the regulation is the ". . . least restrictive which can be imposed consistent with assuring continued preservation of the resource." *Sohappy v. Smith, supra,* p. 907. The State has not dealt with the matter of Indian rights as a subject separate and distinct from that of fishing and hunting by others. It has not regulated the taking of game so that the members of the tribe will be accorded" . . . an opportunity to take at their usual and accustomed places by reasonable means feasible to them, a fair and equitable share of the resource." *Sohappy, Ibid.* The state has not established ". . . that the regulation is supported by the evidence on grounds of being necessary for the conservation . . ." of the resource. *Dept. of Game v. Puyallup,* 80 Wn.2d 561, 574, 497 P.2d 171 (1972).

In the present case one Indian shot one deer for his personal use. This was done pursuant to rights guaranteed him by agreement with the United States government. The State may not take away that right where it fails to present any evidence whatsoever that such an action is necessary for conservation.

CONCLUSION

Appellant Alexander Antoine shot a deer during closed season under State law. He sought to do so pursuant to rights guaranteed him by an Agreement between his tribe and the United States government signed in 1891. The Agreement, ratified by the Congress in 1906, is the supreme law of the land, is to be construed in favor of the preservation of Indian rights, and supercedes any State laws on the matter.

Prior to the time of the Agreement, the members of Mr. Antoine's tribe possessed exclusive and unrestricted rights to hunt and fish on their reservation. When this land was ceded back to the United States government, the Indians reserved all hunting and fishing rights except their exclusive nature, agreeing to allow the whites to fish and hunt "in common with" them. The plain meaning of the 1891 Agreement (which states that the Indians' hunting rights shall not be "taken away or in anywise abridged") that the State has no power to impair, abridge or restrict those rights.

Even assuming, *arguendo*, State power to regulate as necessary for conservation, the State has not met its burden in that regard and any attempt to enforce such regulations against appellant are invalid.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET
& ERNSTOFF
By MASON D. MORISSET
Attorneys for Appellants

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitutional Provisions:

United States Constitution, Art. I §8, cl. 3

> "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States and with the Indian Tribes;"

United States Constitution, Art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Congressional Acts:

Act of June 21, 1906 (34 Stat. 325, at 377)

To carry into effect the agreement bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States under authority of the act of Congress approved August nineteenth, eighteen hundred and ninety, to negotiate with the Colville and other bands of Indians on said Colville Reservation for the cession of such portion of said reservation as said Indians might be willing to dispose of, there shall be set aside and held in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for one million five hundred thousand acres of land opened to settlement by the act of Congress 'To provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes,' approved July first, eighteen hundred and ninety-two, the sum of one million five hundred thousand dollars, . . .

Act of March 1, 1907 (34 Stat. 1015, 1051)

In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by an act of Congress "To provide for the opening of a part of the Colville Reservation in the State of Washington, and for other purposes," approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the act approved June twenty-first, nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one, three hundred thousand dollars, said sum of three hundred thousand dollars to be paid to or expended for the benefit of said Indians under the direction of the Secretary of the Interior.

State Statutes

Revised Code of Washington

77.16.020 ***Taking during closed season—Exceeding bag limits—Taking within reserves.*** It shall be unlawful for any person to hunt, trap, or fish for any game birds, game animals, fur-bearing animals or game fish during the respective closed seasons therefor. It shall also be unlawful for any person to kill, take, or catch any species of game birds, game animals, furbearing animals, or game fish in excess of the number fixed as the bag limit. It shall also be unlawful for any person to hunt or trap for any game birds, game animals, or fur-bearing animals within the boundaries of any game reserve or closed area, and it shall likewise be unlawful for any person to fish for any game fish within any closed waters or within the boundaries of any game fish reserve.

Any person who hunts or traps any elk, moose, antelope, mountain goat, mountain sheep, caribou or deer in violation of this section is guilty of a gross misdemeanor and shall be punished by a fine or not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days

and not more than one year or by both such fine and imprisonment.

Any person who hunts or traps any game bird in violation of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

77.16.030 ***Possession during closed season or in excess of bag limits.*** It shall be unlawful for any person to have in his possession or under his control any game bird, nongame bird, game animal, fur-bearing animal, or game fish, or part thereof, during the closed season or in excess of the bag limit.

Any person who has in his possession or under his control any elk, moose, antelope, mountain goat, mountain sheep, caribou, deer, or parts thereof in violation of the foregoing portion of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who has in his possession or under his control any game bird or part thereof in violation of the foregoing portion of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

Provided, That any person who has lawfully acquired possession of any game bird, game animal, or game fish, or part thereof, and who desires to retain it for human consumption or ornamental purposes, or desires to sell the skin, hide, horns, head, or plumage thereof, after the close of the season may do so in accordance with the rules and regulations of the commission.

Provided, further, That the owner of any game bird, nongame bird, game animal, fur-bearing animal, or game fish, who has lawfully propagated it or purchased from one who has so propagated it, may possess, ship, sell or otherwise dispose of such bird, animal or fish, when properly tagged or sealed.

SUPREME COURT, U. S.

SEP 16 19

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-717

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IRENE F. ANTOINE, his wife — *Appellants,*

v.

THE STATE OF WASHINGTON, — *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

SLADE GORTON,
Attorney General
State of Washington

JOSEPH LAWRENCE CONIFF, JR.,
JAMES M. JOHNSON,
Assistant Attorneys General

Attorneys for Appellee.

Office and Post Office Address:
000 No. Capitol Way
Olympia, Washington 98504
Telephone: AC 206, 753-2402

September, 1974

STATE PRINTING PLANT — OLYMPIA, WASHINGTON

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SLADE GORTON,
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State of Washington

JOSEPH LAWRENCE CONIFF, JR.,
JAMES M. JOHNSON,
Assistant Attorneys General

Attorneys for Appellee.

Office and Post Office Address:
600 No. Capitol Way
Olympia, Washington 98504
Telephone: AC 206, 753-2498

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BRIEF OF APPELLEE

STATUTES INVOLVED

Appellee State of Washington (hereinafter referred to as "State") cannot accept appellants' (hereinafter referred to as "Antoine") statement of "Statutes and Federal Laws Involved."[1]

The paramount statutes and federal laws involved in this appeal are:

1. Executive Order Establishing Original Colville Reservation Boundaries, July 2, 1872, 1 Kappler 916.[2]

[1] App. Br., p. 4.
[2] Single App., p. 3.

2. Congressional Prohibition of Execution and Ratification of Indian Treaties, March 3, 1871 (23 Stat. 79, 25 U.S.C. 71).
3. State of Washington Enabling Act, approved February 22, 1889 (25 Stat. 180) and the President's Proclamation Declaring Statehood, November 11, 1889 (26 Stat. 10).
4. Agreement between Colville Tribe and United States, May 9, 1891.[3]
5. Restoration of Northern Half of Colville Reservation to the Public Domain, July 1, 1892, 27 Stat. 62.
6. Congressional Authorization of $1,500,000.00 to Colville Tribe for Lands Acquired by Purchase of "Northern Half," July 21, 1906 (34 Stat. 325).[4]
7. Revised Code of Washington 77.16.020 and 77.16.030.[5]

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The State does not accept Antoine's statement of questions presented. The State submits that the question presented is:

> Is the 1891 "Agreement of Sale" between the Colville Indian Tribe and the United States a treaty thus precluding the state of jurisdiction to enforce its hunting laws on Colville Indians on the lands sold which were formerly the Northern Half of the Colville Reservation?

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[3]Single App., pp. 4-11, Def. Ex. #4.
[4]Juris. Statement, App. G -12.
[5]Juris. Statement, App. G 2-4.

STATEMENT OF THE CASE

The State cannot accept Antoine's statement of the case. The trial court considered this case on facts stipulated by counsel; no testimony was submitted. The facts, as stipulated, are:

> (1) That on September 11, 1971, the defendant was engaged in the activity of hunting for deer in Ferry County, Washington, within the exterior boundaries of the original Colville Indian Reservation as established by Executive Order of 1872.
> (2) That at the time and on the date in question the defendant had in his possession a game animal; to-wit, a deer.
> (3) That on the date in question the hunting season was closed for deer in the area involved in Ferry County.
> (4) The defendant was a duly enrolled and qualified member of the Colville Tribe of Indians.
> (5) That the offenses occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists.
> (6) That the land upon which the offense occurred was unallotted non-Indian land at the time of the offense.[6]

In addition to the stipulated facts, Antoine submitted four exhibits consisting of certified re-typed copies of the 1891 agreement between the Colville Tribe of Indians and the United States and notes of the negotiations.[7] The State introduced one exhibit[8]

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[5]R. 6-9; Antoine states as a "fact" that he "shot one deer for personal use" (App. Br., p. 25) that "500 or more Colville families who live on or near the reservation * * * depend upon game as a food source" (App. Br., p. 10); and that the Colvilles' "hunting was a major source of food and a major activity." (App. Br., p. 11 and fn. 33 and 34). No such "facts" are in the record before the Court.

[7]Def. Ex. #1 through 4.

[8]State's Ex. #1.

which is a map with a red circle indicating the location of the illegal deer shining activities on unallotted lands outside the present boundaries of the Colville Reservation in what is referred to in this brief as the "Northern Half." The Northern Half consists of the lands sold under the 1891 agreement of sale which were formerly the Northern Half of the Colville Reservation.

SUMMARY OF ARGUMENT

1. The 1891 Agreement of Sale between the Colville Indian Tribe and the United States is not a treaty.

Congress had, previous to 1891, prohibited the making of further treaties with Indian tribes. 25 U.S.C. 71, 23 Stat. 79. *Starr v. Long Jim*, 227, U.S. 613 (1913) held that an agreement with the Columbia and Colville Indians, similar to the 1891 agreement of sale, could not be a treaty because it was executed after March 3, 1871.

The agreement of 1891 could not be construed as a treaty because it was not ratified in accordance with the *United States Constitution*, Article II, Section 2, Clause 2.

The treaty making power conferred by the *United States Constitution* cannot be used to achieve an unconstitutional end. Once a state has lawfully assumed jurisdiction, it cannot be taken away with-

out its consent. *Geofroy v. Riggs*, 133 U.S. 258 (1890).

2. The State of Washington possesses jurisdiction to enforce its hunting laws on the Northern Half of the original Colville Indian Reservation.

Congress expressly extinguished the Northern Half of the Colville Indian Reservation, 27 Stat. 62 (1892). Congress has subsequently treated it as extinguished. 34 Stat. 80; 39 Stat. 123; 39 Stat. 672; 39 Stat. 1778. This Court has recognized the extinguishment of the Northern Half. *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1972).

Antoine stipulated in the trial court that the offense occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists. (R. 8)

There has been no subsequent withdrawal of the lands in the former Northern Half of the Colville Indian Reservation from the jurisdiction of the State of Washington. The consent of the state legislature is constitutionally required. *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937).

Public Law 280, 67 Stat. 588, does not purport to limit the exercise of jurisdiction by the State of Washington over the lands in question because it applies only to Indian reservations in existence at the date of its enactment (August 15, 1953). The Northern Half of the Colville Indian Reservation was extinguished in 1892. 27 Stat. 62.

ARGUMENT

1. Introduction

There is no dispute that appellants[9] violated Washington State game laws in an area once a part of the Colville Indian Reservation. The location where the crime occurred is not part of that reservation because the reservation status of that area was terminated pursuant to an act of Congress.[10] The question is simply the validity of the claim of Alexander Antoine to an immunity from prosecution for such off-reservation violations. It is the State's position that there is no impediment to the enforcement of the state game laws in this case.

2. The 1891 Agreement of Sale between the Colville Indian Tribe and the United States is not a Treaty.

It is the State's position that the 1891 "agreement of Sale"[11] is not a treaty and therefore the Supremacy Clause of the Constitution[12] does not create an impediment to the enforcement of the state game laws in this case.

Congress specifically prohibited further recognition of Indian tribes as independent nations subsequent to March 3, 1871. The prohibition against

[9]It is admitted that Irene Antoine is not a member of the Confederated Tribes and Bands of the Colville Indian Reservation. App. Br., p. 4, fn. 14. The United States notes that she "is a Canadian Indian and not enrolled in the United States." (Memo. for United States as *Amicus Curiae*, p. 2.) No argument is advanced that she is entitled to an immunity from the application of the hunting laws in qu stion under any of the theories advanced by appellants.

[10]27 Stat. 72 (1892).

[11]Single App., pp. 4-11, Def. Ex. #4.

[12]*United States Constitution*, Art. VI, Cl. 2.

further treaty-making is found in 25 U.S.C. 71, 23 Stat. 79:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 31, 1871, shall be hereby invalidated or impaired."

Starr v. Long Jim, 227 U.S. 613 (1913), held that an agreement between the United States and representatives of the Columbia and Colville Indians was not a treaty because of 25 U.S.C. 71, *supra*. Congress chose to conduct its relationship with Indian tribes by statutes or agreements rather than by the treaty making power subsequent to March 3, 1871.

Antoine[13] and the Federal Government [14] have chosen to ignore the clear language of 25 U.S.C. 71, *supra*. The argument is advanced that Congress "ratified" the 1891 agreement of sale by a 1906 authorization act.[15] The short answer is that the *Constitution of the United States* specifically provides for the making of treaties by the Federal Government by stating that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." *Constitution of the United States*, Article II, Section 2, Clause 2. No authority is provided to

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[13] App. Br., pp. 14-18.

[14] U. S. Memo. as *Amicus Curiae*, pp. 4-6.

[15] 34 Stat. 325, 377-378; 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1074.

support Antoine's novel assertion that House of Representatives' authorization and appropriation acts amount to ratification. The authority cited by the Federal Government, as *Amicus Curiae*, does not deal with question of treaty ratification.[18]

An additional reason militates against the argument that the 1891 "agreement of sale" is a treaty. Congress exercised its "absolute control" over the Northern Half of the Colville Indian Reservation by ceding its jurisdiction to the State of Washington on July 1, 1892, 27 Stat. 62-64. This statute provides that the Northern Half:

> * * * be, and is hereby, vacated and restored to the public domain, notwithstanding any Executive Order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians, and the same shall be opened to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington." (27 Stat. at 62)

It is well established that the State of Washington acquired jurisdiction over the Northern Half by virtue of the cession. *United States v. Pelican*, 232 U.S. 442 (1914); *Seymour v. Superintendent*, 368 U.S. 351 (1962); and *Mattz v. Arnett*, 412 U.S. 481 (1974) at footnote 22.

To construe the 1906 authorization act and sub-

[18] e.g., *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 293; *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116. Both opinions deal with subsequent Congressional ratification of executive acts under the President's war power and of administrative interpretation and approval of certain water development and use contracts of the Secretary of Interior.

sequent appropriation acts as constituting a "ratification" of the 1891 "agreement of sale" would elevate its status to that of a treaty. Such a construction would violate the treaty-making power granted by the *Constitution of the United States*, Article II, Section 2, Clause 2. The treaty-making power does not extend so far as to authorize a cession of any portion of a state's territory without its consent. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Fort Leavenworth Ry. Co. v. Lowe*, 114 U.S. 525, 532-533 (1885). The Act of July 1, 1892, 27 Stat. 62, vacated and restored to the public domain a certain portion of the reservation (the Northern Half) to be disposed of under the general laws applicable to the disposition of public lands in the State of Washington. The state legislature has not expressed its consent to a retrocession of the Northern Half to the Colville Indian Tribe or the United States. The Northern Half remains under state jurisdiction.

Antoine and the Federal Government, proceeding from the faulty premise that a treaty right is involved, rely upon a number of decisions involving interpretations of federal treaties pertaining to fishing and hunting, e.g., *Tulee v. Washington*, 315 U.S. 681 (1942); *United States v. Winans*, 198 U.S. 371 (1905); *Puyallup Tribe v. Dept. of Game*, 391 U.S. 392 (1968); *Dept. of Game v. Puyallup Tribe* (1973), 414 U.S. 44. The State submits that such reliance is not apropos since no "treaty" is involved in this appeal.

3. The State of Washington possesses jurisdiction to enforce its hunting laws on the Northern Half of the original Colville Indian Reservation.

The State of Washington was admitted into the Union in 1889 pursuant to its Enabling Act. (25 Stat. 180) It entered the Union on equal footing with all other states including jurisdiction over all lands included except areas over which jurisdiction was specifically reserved.

The provision reserving lands from the jurisdiction of Washington is specific:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and *said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.* * * *[11] (25 Stat. 180)

Lands of the Colville Reservation established prior to statehood by Executive Order were thus retained under the "jurisdiction and control of the congress of the United States."

In 1892 Congress transferred its reserved jurisdiction to the State of Washington. 27 Stat. 62 provides, in relevant part, that the Northern Half:

> be, and is hereby, vacated and restored to the

[11] Washington State Constitution, Article XXVI (Compact with the United States) includes nearly an identical provision.

> public domain, not withstanding any Executive Order or other proceeding whereby the same was set apart as a reservation and for any Indians or bands of Indians, and the same shall be opened to settlement and entry by the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington.

This resulted in removing the Northern Half of the original reservation from its reservation status and granted the State of Washington jurisdiction over those lands to the same extent the state had received jurisdiction over other public lands by the Enabling Act.

The House proposal (23 Cong. Rec. 3840) and the agreement of 1891, the status of which has previously been discussed, had included a reservation of some hunting and fishing rights. However, that Act, as passed by Congress (as noted in the United State's Memorandum at page 5), did not include any reservation of hunting and fishing rights. The absence of any reservation of hunting or fishing rights in the final act reflects Congressional intent not to reserve such rights.[15]

Congress subsequently has, on numerous occasions, dealt with the Colville Indian Reservation and treated it as diminished; as if the former Northern Half were no longer on Indian reservation nor Indian country.

In 1906 Congress granted the Secretary of In-

[15]See: *Mattz v. Arnett*, 412 U.S. 481 (1972).

terior authority to sell or dispose of certain unallotted lands in the diminished Colville Indian Reservation. 34 Stat. 80, 81, 82. Congress referred to the diminished Colville Indian Reservation in the State of Washington in the annual appropriation of 1916-17 for the Bureau of Indian Affairs. 39 Stat. 123 at 154. Again, Congress extended the authority of the Secretary of Interior to dispose of surplus unallotted lands of the diminished Colville Indian Reservation. 39 Stat. 672.

President Woodrow Wilson issued a proclamation pursuant to Congressional authority opening the unallotted irrigable lands within the diminished Colville Indian Reservation to homesteading entry on May 3, 1916. 39 Stat. 1778, IV Kappler, *Indian Affairs, Laws, and Treaties*, 966. Congress referred to the diminished Colville Indian Reservation in the State of Washington in a statute providing for the descent and distribution of lands to heirs of deceased Indians and the disposition and sale of unallotted land of deceased Indians. III Kappler, *Indian Affairs, Laws, and Treaties*, 476.

The status of portions of the Colville Reservation has been the subject of litigation. This Court in *Seymour v. Superintendent*, 368 U.S. 351 (1962) specifically recognized the severance of the Colville Reservation by the 1892 Act, *supra*. The Northern Half, which is the subject matter of this litigation was subject to state jurisdiction. The issue presented in *Seymour* was whether the Southern Half had been,

diminished. The Court was confronted with a question of jurisdiction of the State of Washington for a criminal offense committed by a Colville Indian on the diminished (Southern Half) of the Colville Reservation in the town of Omak, Washington. The Court overruled the Supreme Court of the State of Washington which had previously held that the state possessed jurisdiction over the Southern Half. 368 U.S. at 357. In reaching this conclusion, the Court was careful to distinguish between the Southern Half, i.e., diminished reservation boundaries and the jurisdictional status on the former Northern Half. The Court stated:

> The case turns upon the current status of the Colville Indian Reservation—a reservation created in 1872 by Executive Order of President Grant which declared that "the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for the Colville Indians. *In 1892, the size of this reservation and allotments made to individual Colville Indians, about one-half of the original Colville reservation, since commonly referred to as the "North Half," should be vacated and restored to the public domain* * * *" This Act did not, however, propose to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the government for their (the Colville Indians') use and occupancy. Since the burglary of which petitioner was convicted occurred on land within the South Half, it is clear

> that state jurisdiction over the offense charged, if it is to be found at all, must be based upon some federal action subsequent to the 1892 Act. (368 U.S. at 354. Emphasis supplied.)

The Court, in considering termination of Indian reservations and how it might be accomplished by Congress, held that the 1892 Act is an example of clear Congressional intent to terminate a portion of the Colville Reservation. *Mattz v. Arnett*, 412 U.S. 481 (1972). The Court, speaking unanimously through Justice Blackmun, stated:

> Congress has used clear language of express termination when that result is desired. See, for example, 15 Stat. 221 (1868) ("The Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) (adopted just two weeks after the 1892 Act with which this case is concerned, providing that the North Half of the Colville Indian Reservation, "the same being a portion of the Colville Indian Reservation * * * be, and is hereby, vacated and restored to the public domain"), and *Seymour v. Superintendent*, 368 U.S., at 354; 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished"). (412 U.S. at 504, fn. 22)

Further, it was stipulated at trial of this action that "the offenses occurred outside the exterior boundaries of the Colville Indian Reservation as it presently exists." and was "unallotted."[19] Thus, the *locus delicti* was not within an area "excepted from the portion restored to the public domain." *United States v. Pelican*, 232 U.S. 442 at 449 (1914).

[19] R. 8.

There has been no subsequent withdrawal of the lands in the former Northern Half of the Colville Reservation from the jurisdiction of the State of Washington. Once a state has jurisdiction over its lands, the Constitution specifies that such jurisdiction may be retroceded only with consent of the legislature of that state. *United States Constitution*, Article I, Section 8, Clause 16. This provision applies broadly; not just to retrocession of jurisdiction for specified uses (e.g., *James v. Dravis Construction Co.*, 302 U.S. 134 (1937); *State ex rel. Board of Commissioners v. Bruce*, 106 Mont. 322, 77 P.2d 403, aff'd 305 U.S. 577 (1938)).

Where there has been no expression of consent by the legislature as constitutionally required, the state retains jurisdiction despite the fact that the federal government has repurchased lands once under its exclusive jurisdiction, *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937); *United States v. McGowan*, 302 U.S. 535 (1938).

The State assumed criminal and civil jurisdiction over established Indian reservations in response to Public Law 280 (67 Stat. 588).[20] As previously noted, the Northern Half of the Colville Indian Reservation was extinguished by Congress and the State assumed jurisdiction over it in 1892. The Northern Half is not within the purview of Public Law 280,

[20]RCW 37.12.010 provides, in relevant part:

"The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, *reservations*, country and lands within this state in accordance with the consent of the United States given by the Act of August 15, 1953 (Public Law 280, 83rd Congress, 1st session). * * *"

or the State's legislative response thereto, because it was not an established Indian reservation on August 15, 1953—the effective date of the Act.

Menominee Tribe v. United States, 391 U.S. 404 (1968) holds that Public Law 280 must be construed *in pari materia* with the Menominee Termination Act. The Court noted:

> Public Law 280, as amended, became the law in 1954, nearly seven years *before* the Termination Act became fully effective in 1961. In 1954, when Public Law 280 became effective, the Menominee Reservation was still "Indian country" within the meaning of Public Law 280. (391 U.S. at 411, Emphasis by the Court)

Antoine's reliance upon *Menominee* is misplaced because the extinguishment of the Northern Half of the Colville Indian Reservation by Congress some 62 years prior to its enactment of Public Law 280.

The arguable limitation on the exercise of state jurisdiction over "any right, privilege or immunity afforded under federal treaty, agreement, statute or Executive Order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof"[21] is not applicable because the Northern Half lost its unique status as an established Indian reservation in 1892 (27 Stat. 62). Public Law 280, *supra*, by its terms, does not apply to state jurisdiction over Indians outside reservation boundaries.

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[21] RCW 37.12.060; App. Br., p. 16, fn. 43 and United States Memo. as *amicus curiae*, p. 4, fn. 3.

CONCLUSION

The facts of this case are not in dispute. The novel proposition advanced by Antoine is that the Colvilles may reclaim rights in the extinguished Northern Half of the original reservation. Alternatively, he argues that he may claim "treaty rights" by virtue of an 1891 agreement of sale.[22] This Court should reject such claims.

For these reasons, the State submits that the decision of the lower court should be affirmed and that both appellants' convictions for hunting and possessing a game animal during closed season contrary to state law be upheld.

Respectfully submitted:

SLADE GORTON,
Attorney General
State of Washington

JOSEPH LAWRENCE CONIFF, JR.,
Assistant Attorney General

JAMES M. JOHNSON,
Assistant Attorney General

GRANVILLE EGAN,
Prosecuting Attorney
Ferry County, Washington

September, 1974

[22]Neither argument would support immunity from the challenged state laws for Irene Antoine.

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-717

ALEXANDER J. ANTOINE AND IRENE F. ANTOINE, APPELLANTS

v.

THE STATE OF WASHINGTON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether an agreement between the Colville Confederated Tribes and the United States by which the Tribes ceded a portion of their lands, reserving hunting and fishing rights therein, was ratified by Congress and is binding on the State of Washington.

2. Whether a provision of the Agreement stipulating that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians

shall not be taken away or in anywise abridged", exempts the members of the Tribes from state game regulations, unless the State affirmatively shows a need to restrict their hunting in the interest of conservation.

STATEMENT

This brief supplements the memorandum submitted in response to the Court's order of February 19, 1974, inviting the Solicitor General to express the views of the United States in the case, the Court having noted probable jurisdiction on June 17, 1974.

Alexander Antoine and his wife, Irene, were convicted in the courts of the State of Washington for shooting and killing a deer during the closed hunting season fixed by state law. Their defense was that they killed the deer on land within the boundaries of the original Colville Indian Reservation on which they have the right to hunt subject only to tribal or federal regulation.[1] Mr. Antoine is an enrolled member of the Colville Confederated Tribes, which are recognized by the United States Government. Mrs. Antoine is a Canadian Indian and is not enrolled in the United States.[2]

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[1] The status of the southern half of this reservation was the subject of *Seymour* v. *Superintendent*, 368 U.S. 351. This case, as explained within, concerns residual rights in the northern half.

[2] Before the State courts, the State apparently did not contest that both Mr. and Mrs. Antoine are entitled to the rights of members of the Colville Tribes on the property in question, if such rights encompass hunting free of state regulation. See

By Executive Order of July 2, 1872 (1 Kapp. 915), President Grant established a reservation for Indian tribes which subsequently formed the Colville Confederated Tribes. Pursuant to an Act of August 19, 1890 (26 Stat. 355), a commission was appointed by the President to negotiate with the Tribes for "the cession of such portion of said reservation as said Indians may be willing to dispose of * * *." The commission entered into an agreement with the Tribes dated May 9, 1891 (App. 4-11), in which the Tribes surrendered to the United States "* * * all their right, title, claim and interest in * * *" a tract of land constituting approximately the northern half of the reservation (App. 4, Art. 1). However, with respect to the ceded tract, Article 6 of the Agreement expressly provided that "* * * the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (App. 7). Article 12 stipulated that the Agreement "shall go into effect from and after its approval by Congress" (App. 10). Further articles, among other things, granted the Indians a right to allotments on the ceded lands, and promised them a cash payment of $1,500,000, in five installments.

In 1892, without expressly ratifying the Agreement, Congress passed a law (Act of July 1, 1892, 27 Stat. 62), providing that the northern half of

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App. 18, 20-21. In those circumstances, it may now be estopped from raising the issue of Mrs. Antoine's status. See Brief of Appellee, pp. 10 n. 9, 21 n. 22.

the reservation was "vacated and restored to the public domain * * *," and was "open[ed] to settlement * * * [to be] disposed of under the general laws applicable to the disposition of public lands in the State of Washington" (*id.* at 63). The Act omitted any reference to Article 6 of the 1891 agreement, securing the right to hunt and fish, or to Article 11, providing a consideration of $1,500,000 for the land sold.

The Colville Tribes, recognizing that the government was not carrying out the terms of the 1891 Agreement, began to press for further action by Congress. See *Butler and Vale* v. *United States*, 43 Ct. Cl. 497; see also S. Rep. No. 2561, 59th Cong., 1st Sess. By the Act of June 21, 1906, 34 Stat. 325, 337-378, Congress reconsidered its prior action and authorized the payment of $1,500,000 for the land ceded to the United States. The 1906 Act recited, *inter alia*, that payment of the money was "[t]o carry into effect the agreement [dated May 9, 1891] * * * entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States * * *." The $1,500,000 authorized in the 1906 Act was actually appropriated for the Indians in five subsequent Acts, each providing $300,000: 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1075. Each of these statutes is essentially identical and provides that the appropriation is (34 Stat. 1015, 1050-1051):

> In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by [the 1892 Act] * * * being a part of the full sum set aside * * * in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, *ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one,* * * *. [Emphasis added.]

In affirming appellants' conviction, the Supreme Court of the State of Washington held that the 1891 Agreement was a mere contract between the Indians and the United States, which does not bind the State of Washington (App. 30). The court also held that the Agreement, even if enforceable against the State, was not intended to exempt the Indians from state game laws (App. 30-31). We challenge both conclusions.

ARGUMENT

I

THE AGREEMENT OF MAY 9, 1891, WAS RATIFIED BY CONGRESS AND IS BINDING ON THE STATE OF WASHINGTON

The Agreement of May 9, 1891, was never intended to be complete in itself: by its terms it was to become effective "* * * from and after its approval by Congress" (App. 10). The initial question, therefore, is whether that subsequent ratification occurred. If so, the Agreement would have the same force as

an Act of Congress and thus became a law binding on the States. U.S. Const., Art. VI, cl. 2.

1. Contrary to appellee's argument (Br. 10-13), it does not matter that the agreement was made after the Act of March 3, 1871 (16 Stat. 544, 566, 25 U.S.C. 71) ending the practice of making treaties with Indian tribes. Congress's plenary power to legislate on the subject of Indian affairs and Indian property remained unaffected. See *Morton* v. *Mancari*, No. 73-362, decided June 17, 1974, slip. op. 16-17. So far as relevant here, the only effect of the 1871 law was that, henceforth, for purchases of land from Indian tribes, the consent of the House, as well as the Senate and President, would be required—in short, that an Act of Congress would be necessary to ratify an agreement. But an agreement so ratified is the supreme law of the land, just as a treaty would be.

This was settled by the Court shortly after the practice of making treaties with the Tribes was ended. In *Choate* v. *Trapp*, 224 U.S. 665, it was held that tax exemptions granted by an agreement between the United States and an Indian tribe made in 1897 as part of a cession of Indian lands, and ratified by Act of Congress, were enforceable against the State of Oklahoma. The Court also announced the rule that the terms of the Agreement and ratifying Act by which the Tribe ceded its land, even though creating a tax exemption which would ordinarily be interpreted strictly, should be liberally read in favor of the Indians. *Id.* at 674-677; see also *Squire* v.

Capoeman, 351 U.S. 1. A few years later, in *Perrin* v. *United States*, 232 U.S. 478, the Court similarly upheld a clause of an agreement ratified by Act of Congress that no intoxicating liquor should be sold on the land ceded in the agreement. *Id.* at 480. These precedents are equally applicable to the reservation of hunting and fishing rights in an agreement relinquishing land.[3]

2. That Congress did ratify the 1891 Agreement is shown by the language of the Acts of Congress and their legislative history. The original intent was to purchase the northern half of the Colville Tribes' land under terms and conditions satisfactory to the Tribe. Indeed, it was Congress itself, by Act of August 19, 1890, *supra*, that authorized the President to appoint a commission to negotiate an agreement with the Tribes for the purchase of the land. Accordingly, an agreement was worked out and signed (App. 4-11). The next year, the House of Representatives voted to ratify the Agreement with certain changes.[4]

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[3] We note also that the State of Washington, in assuming limited jurisdiction over Indians under Pub. L. 83-280, 67 Stat. 588, enacted RCWA 37.12.060 which states:

> Nothing in this chapter * * * shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, *agreement*, statute, or executive order with respect to Indian land grants, hunting, trapping or fishing or the control, licensing, or regulation thereof. [Emphasis supplied.]

[4] Specifically, the House bill replaced the $1,500,000 lump sum payment called for in the agreement, with a payment of

To be sure, the Senate disagreed,[5] and (as we have seen) the 1892 Act provided no consideration for the Indians, and made no mention of the hunting and fishing rights preserved in the agreement. But that is not the end of the story.

This failure by Congress to live up to the terms of its agreement was before long widely seen as unacceptable. In addition to the Tribes' protest (see p. 4, *supra*), Mark Fullerton, who had been head of the commission that negotiated the treaty and then had become Chief Justice of the Supreme Court of the State of Washington, spoke out. In a letter reprinted in the Senate Report on the future 1906 Act (S. Rep. No. 2561, *supra*, at p. 140) he said:

> It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie to earth, I can not help a feeling

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$1.25 per acre, to be paid to the credit of the Indians as the land would be opened for homesteading. The bill explicitly preserved the hunting and fishing rights guaranteed in the agreement. 23 Cong. Rec. 3840.

[5] The Senate contested the Indians' title to the Reservation on the ground that it had been created by Executive Order, and expressed unwillingness to pay for what was being taken. See S. Rep. No. 664, 52d Cong., 1st Sess., p. 2. The Senate bill eventually became the Act of July 1, 1892.

> of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation.

The Department of the Interior also publicly favored a bill to carry into effect the Agreement of 1891 and assured the Congress that it had:

> * * * reviewed at some length the matter of the title of the Colville Indians * * * and * * * had not the slightest doubt as to the possessory rights of said Indians to the lands within the reservation, "rights which the courts have always recognized without qualification * * *." S. Rep. 2561, *supra*, at pp. 137, 139.]

And, finally, there were growing pressures to open to non-Indian settlement the southern half of the original reservation, an action to which the Tribes would consent only if the 1891 Agreement were fully carried out. See S. Rep. No. 2561, *supra*, at pp. 134-140.

These combined motives finally persuaded Congress to respond. And so, by the Act of June 21, 1906, 34 Stat. 325, 377-378, Congress authorized payment of $1,500,000 expressly "[*t*]*o carry into effect the agreement* bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States * * *" (emphasis added). Later in the same session, in appropriating $300,000 of the authorized funds. Congress expressly referred to the 1906 Authorization Act as an Act "ratifying the agreement ceding

said land to the United States, under date of May ninth, eighteen hundred and ninety-one" (*supra*, p. 5). These enactments, we submit, fully qualify as a congressional ratification of the 1891 Agreement.[6]

3. The State of Washington argues (Br. 18-20) that when the land in question was opened to settlement by the Act of July 1, 1892, State jurisdiction vested and could not be revoked by the 1906 ratification of the 1891 Agreement. This, however, misconstrues the effect of a cession to the United States and ignores the continuing power of Congress.

The land after cession remained public land of the United States, except to the extent that patents were issued to homesteaders. Most of the ceded tract remains federal land today and is part of the Okanogan Colville National Forest.[7] Thus, in addition to its

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[6] The Court has found congressional ratification of Presidential acts creating property rights on far less certain language. Compare *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116. In *Confederated Tribes of the Colville Reservation* v. *United States*, Docket No. 181-C, pending before the Indian Claims Commission, the United States, relying upon the language of the Act of June 21, 1906, but not the subsequent appropriations Acts, argued that the 1906 Act did not constitute a ratification of the 1891 Agreement. Considering the Acts together, we now conclude to the contrary (and have so informed the Commission, while preserving our right to rely in that case upon the possibility that this Court in the present case may disagree with us).

[7] See U.S. Department of the Interior, Bureau of Indian Affairs Map, *Indian Lands and Related Facilities as of 1971*. We are lodging copies of the map with the Clerk and supplying copies to opposing counsel.

power to legislate for the protection of Indians wherever located (*United States* v. *Ramsey*, 271 U.S. 467, 471; *Morton* v. *Ruiz*, 415 U.S. 199, 236), Congress retained plenary authority over the use of public land. *United States* v. *Gratiot*, 14 Pet. 526, 537.[8] That power was amply sufficient to vindicate rights promised to the Tribes in the 1891 Agreement.[9]

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[8] See, also, *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404-405; *McKelvey* v. *United States*, 260 U.S. 353, 359. Even without statutory permission, Federal officials may kill deer on federal land in violation of state game laws, when the killing is for the good of the property, *Hunt* v. *United States*, 278 U.S. 96, or for the purposes of an environmental study, *New Mexico State Game Commission* v. *Udall*, 410 F. 2d 1197 (C.A. 10), certiorari denied, 396 U.S. 961. Here, of course, the Indians' right is protected by statute.

[9] The only person who might legitimately complain of the 1906 ratification would be someone who bought land in the ceded area between 1892 and 1906 in reliance on the 1892 Act, or his successor, assuming the reserved hunting and fishing rights apply to private property. But see 12, *infra*. Even such a purchaser, however, could not set aside the 1906 Act of Congress; his remedy would be to seek just compensation for any diminution of the value of his property resulting from the 1906 ratification of hunting and fishing rights.

II

STATE HUNTING LAWS ARE INAPPLICABLE TO BENEFICIARIES OF THE AGREEMENT OF MAY 9, 1891, IN THE ABSENCE OF A SHOWING OF THEIR NECESSITY AS CONSERVATION MEASURES

Assuming that the 1891 Agreement was ratified by Congress and therefore has the same force as a federal statute or treaty, the question becomes: What rights were guaranteed to the Tribes, and do they include the exemption from the State closed season law claimed here?

We must begin with the words of the Agreement. Article 6 provides "that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (App. 7). That is strong language which, on its face, reserves an important privilege—especially so when we remember the historic dependence of these Tribes on hunting and fishing. To be sure, the right conceded is not made exclusive; it is to be enjoyed "in common with all other persons." But the guarantee is something more than a mere exemption from discrimination. The Indians are not only promised that they will legally share whatever hunting and fishing rights others may enjoy; they are guaranteed these rights absolutely, albeit without power to exclude others. The Agreement grants nothing to non-Indians; the State remains entirely free to prohibit hunting and fishing by all others; not so with respect to Indians, because they enjoy special rights immunized by federal law.

So much is well settled. Indeed, the principle was established on comparable language as long ago as *United States* v. *Winans*, 198 U.S. 371, and was reaffirmed as recently as *Puyallup Tribe* v. *Department of Game (Puyallup I)*, 391 U.S. 392.[10] As the Court said in the latter case (391 U.S. at 397), quoting in part from the earlier decision (198 U.S. at 380):

> To construe the treaty as giving the Indians "no rights but such as they would have without the treaty" * * * would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

And, again: "The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State * * *." 391 U.S. at 398. Those decisions govern here. Indeed, this is a stronger case in light of the additional provision that the right "shall not be taken away *or in anywise abridged.*" Emphasis added. Compare n. 10, below.

Does it follow then, that the Tribes are wholly exempt from *all* State regulation? Strict logic might

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[10] *Winans* involved Article III of the Treaty of 1859 with the Yakamas (12 Stat. 951, 953) which, in pertinent part, reserved to the Indians in the area ceded to the United States "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory."

Puyallup involved Article III of the 1854 Treaty of Medicine Creek (10 Stat. 1132, 1133) which, in pertinent part, provided, with respect to the ceded lands:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * *.

lead us to that extreme. See *Ward* v. *Race Horse*, 163 U.S. 504, 514. But the Court has never gone so far. Although recognizing a unique easement in favor of the Indians over private lands to exercise their fishing rights (*Winans, supra; Seufert Bros. Co.* v. *United States*, 249 U.S. 194), a special immunity from State taxation (*Tulee* v. *Washington*, 315 U.S. 681), and an exemption from the prohibition of net fishing (*Puyallup I, supra; Washington Game Dept.* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44), some power of "regulation" has always been conceded to the States. Indeed, we believe the Court has sometimes been over-generous in recognizing State power.

What is clear is that, if federally protected Indians hunting and fishing rights are to have any meaning, the rule cannot be that "the State may do unto Indians as it may do unto all others." For, in that event, the Indian agreements and treaties would accord them no more than "equal protection"—a superflous gift—[11] and the rights expressly secured could be "taken away" or "abridged" with impunity, the

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[11] We recognize that some passages in both *Puyallup* opinions can be read as defining the fishing rights at issue there in terms of a promise of "equal protection" or an immunity from "discrimination." See 391 U.S. at 398, 403; 414 U.S. at 48. Those expressions, however, cannot be supposed to indicate the Court's view that the express reservation of hunting and fishing rights in Indian cessions merely protected the Tribes from discriminatory State legislation. Else, the Court would not have endorsed the holding of *Winans* that those provisions cannot be construed as confirming "no rights but such as they would have without the treaty." 391 U.S. at 397. See *supra*, p. 13. See, also Puyallup II, *supra*.

State having plenary power absolutely to prohibit hunting and fishing by its non-Indian citizens—whether in the interest of conservation or not. See *Geer* v. *Connecticut*, 161 U.S. 519; *Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549. Nor may the State effectively abrogate the Indian rights by terming its action mere "regulation." At the very least, quantitive restrictions on the exercise of those reserved rights must be "in the interest of conservation" and must meet "appropriate standards," which insure that the interference is "reasonable and necessary." *Puyallup I*, *supra*, 391 U.S. at 398.

The precise contours of that formula have not been defined by this Court. We suggest that it must be a strict standard. After all, what was envisoned when the 1891 Agreement was made was that most members of the Tribes would retire to the southern portion of their reservation, but retain the unencumbered right to use the ceded portion as a "hunting ground," with the sole condition that they could no longer exclude others. Inevitably, that right is already much diminished by the influx of non-Indian settlers, and the resulting contraction of hunting areas[12] and the

[12] We take it for granted that State law may validly confine off-reservation hunting, for Indians and others alike, to areas where the activity will not endanger residents. In this case, moreover, appellants apparently claim no right to hunt on fenced private property. See App. 26. Indeed, since Article 6 of the 1891 Agreement expressly excludes "lands * * * allotted to * * * Indians" from the exercise of hunting and fishing rights, it might well be argued that lands patented to non-Indians should enjoy the same exemption. One can distinguish between the easement over private land which

decrease in available game.[13] It would be unjust to permit further unnecessary dilution of what little remains of the old hunting rights of the Tribes.

In our view, the proper test is satisfied only when it is shown that the restriction—whether a total prohibition of hunting with respect to a particular species or a discrete "game reserve," the establishing of a "closed season," or the fixing of a numerical "bag limit"—*must be applied to Indians* in the interest of conservation. It is not enough that the regulation is labelled a "conservation measure." The State cannot abridge the Indians' federally protected rights without demonstrating a compelling need. No such showing has been attempted here. The State of Washington has not established that applying the ban on out-of-season hunting of deer on the land in question to the Colville Tribes is in any way necessary or even useful for the conservation of deer.[14] And it has not attempted to show whether, if some regulation is desirable, the taking of deer by Indians for private consumption need be prohibited, nor whether the Tribes' own conservation regulations are not ade-

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subsists under *Winans, supra,* to reach and exploit "usual and accustomed" fishing places, and hunting within fenced property. Thus, the treaty construed in *Winans* reserved the right to *hunt* only "upon open and unclaimed land" within the ceded area. See 198 U.S. at 378.

[13] We also assume that necessary safety regulations can be imposed on Indian hunting. Of course, no such regulation is at issue here.

[14] Thinning a herd [redacted] may be useful to conservation. See *Hunt* v. *United States, supra.*

quate. We therefore agree with appellants that their criminal conviction was invalid.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
HARRY R. SACHSE,
Assistants to the Solicitor General.

EDMUND B. CLARK,
EDWARD J. SHAWAKER,
Attorneys.

OCTOBER 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 881437 54

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973
No. 73-717

ALEXANDER J. ANTOINE and
IRENE F. ANTOINE, his wife — *Appellants,*

v.

THE STATE OF WASHINGTON, — *Appellee.*

MOTION TO STRIKE AND REPLY TO AMICUS CURIAE OF APPELLEE

SLADE GORTON,
Attorney General,
State of Washington,

JOSEPH LAWRENCE CONIFF, JR.
Assistant Attorney General,
Attorneys for Appellee.

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
Telephone: AC 206, 753-5318

November, 1974

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973
No. 73-717

ALEXANDER J. ANTOINE and
IRENE F. ANTOINE, his wife *Appellants,*

v.

THE STATE OF WASHINGTON, *Appellee.*

MOTION TO STRIKE AND REPLY TO AMICUS CURIAE OF APPELLEE

I

MOTION TO STRIKE

The Solicitor has, without permission, filed a brief raising new issues beyond the time authorized by Rule 42(2) for the filing of such briefs.[1] The Solicitor has also lodged with the Court a map purporting to show the boundaries of National Forests.

[1]The invitation of the Court to the Solicitor to express his views was limited to the question of noting probable jurisdiction. (Order of February 19, 1974 in this docket file)

Appellee, State of Washington, respectfully requests that the brief and the map[2] be stricken. The Court should look only to the certified record in deciding questions presented. *Lawn v. United States*, 355 U.S. 339, 354 (1958); *McClellan v. Carland*, 217 U.S. 268, 282, 283 (1910).

II

AUTHORIZATION FOR REPLY BRIEF

After receiving the brief from the Solicitor, appellee was advised by the Clerk of the Court to file a response limited in scope to the new issues belatedly injected into this proceeding.

III

IDENTIFICATION OF NEW ISSUE INJECTED BY THE SOLICITOR

It is argued by the Solicitor that the establishment of National Forest land in a substantial portion of the extinguished Northern Half of the Colville Indian Reservation supports, in some manner, the proposition that the state may not enforce its hunting laws.[3]

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[2]Amicus Br., p. 10, fn. 7. Appellee is likewise lodging copies of a map showing, in detail, the boundaries of the Colville National Forest. The map is marked to show that the appellants were arrested by the Wildlife Agent *outside* the boundaries of the National Forest. The marked locations were placed on the map by the Wildlife Agent Robert Ford, who arrested Appellants. We submit that both the Federal map and our map should be ignored. However, if the Court elects to proceed outside the record, we submit that our map should also be considered.

[3]Amicus Br., pp. 10-11.

IV

ARGUMENT IN ANSWER TO *AMICUS CURIAE*

The establishment of the Colville National Forest occurred *after* the cession of jurisdiction over the Northern Half to the State of Washington by Congress.[4] 27 Stat. 62-64 (1892). As pointed out in the state's brief[5], the legislature of the State of Washington has not expressed its consent to a retrocession of jurisdiction of the Northern Half to the United States since 1892. In 1897, Congress enacted certain provisions relating to the establishment of National Forests. (Act of June 4, 1897, ch. 2, § 1, 30 Stat. 36)[6] and provided in pertinent part:

> "The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens of the State."

This Court has construed 16 U.S.C. 480 and held that a state tax on a person removing timber from forest lands imposed no unconstitutional burden on the Federal Government, *Wilson v. Cook*, 327 U.S. 474, 485 (1946). Second, the Court ruled that, under

[4]The Colville National Forest was established by Presidential Proclamation on March 1, 1907.

[5]Appellee Br., p. 13.

[6]Currently codified as 16 U.S.C. 480 with minor amendments not relevant to this case. Act of March 1, 1911, ch. 186, § 12, 36 Stat. 963.

16 U.S.C. 480, Congress declined to accept exclusive jurisdiction over the National Forests and that the state possessed territorial jurisdiction to tax activities carried on within the National Forests. 327 U.S. at 487. It is doubtful that the legislature of the State of Washington could effectively give up jurisdiction over the Colville National Forest in the face of 16 U.S.C. 480.[7]

As noted, the Government ignores the fact that the State of Washington has not purported to retrocede jurisdiction to the United States. The authority relied on by the Government does not support their contention that the state's jurisdiction is somehow limited or rendered inoperative.[8] The fact that federal officials may kill deer to protect federal land or perform an environmental study for the same purpose does not militate against the conclusion that the state possesses jurisdiction to enforce its game laws against members of the Colville Tribe of Indians in the extinguished Northern Half. *Hunt v. United States*, 278 U.S. 96 (1928), and *New Mexico State Game Commission v. Udall*, 410 F.2d 1197 (10th Cir. 1969) hold that federal officials, in the performance of their duties, possess immunity from

[7] See: *Georgia Pacific Corp. v. County of Mendicino*, 340 F. Supp. 1061 at 1070 (D.C. N.D. Cal., 1972).

[8] E.g.: *Morton v. Ruiz*, 415 U.S. 199 (1974) stated the issue "* * * whether the geographical limitation placed upon general assistance eligibility by the BIA is consistent with congressional intent and the meaning of the applicable statutes, * * *" (415 U.S. at 209) and concluded that Congress did not intend to limit general assistance eligibility only to Indians residing *on* a reservation despite inconsistent administrative interpretations by the BIA. (415 U.S. at 237) No question was raised or decided regarding state jurisdiction or claimed immunity from state law on behalf of Indians outside reservation boundaries.

state law. These cases do not address themselves to the question of the exercise of a state's jurisdiction over territory. The appellants are not acting as agents of the Federal government. They claim rights as members of the Colville Tribe of Indians. There is no basis for claiming immunity from the exercise of the state's jurisdiction under these decisions.

III

CONCLUSION

Appellee, State of Washington, respectfully submits that its motion to strike the brief of the United States and the documents lodged with the Clerk should be granted.

In any event, the decision of the court below should be affirmed for the reasons set forth herein and set forth in the brief of appellee previously filed with the court.

Respectfully submitted,

SLADE GORTON,
Attorney General,
State of Washington,

JOSEPH LAWRENCE CONIFF, JR.
Assistant Attorney General,
Attorneys for Appellee.

November 20, 1974

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ANTOINE ET UX. *v.* WASHINGTON

APPEAL FROM THE SUPREME COURT OF WASHINGTON

No. 73–717. Argued December 16, 1974—Decided February 19, 1975

Appellant Indians were convicted of state statutory game violations that had allegedly been committed in an area of a former Indian reservation that the tribe had ceded to the Government by an Agreement made in 1891, later ratified and implemented by Congress, one of whose provisions (Art. 6), relied upon as a defense by appellants, specified that the hunting rights of Indians in common with other persons would not be taken away or abridged. The State Supreme Court, upholding the lower court's rejection of appellants' defense, held that Congress was not constitutionally empowered to inhibit a State's exercise of its police power by legislation ratifying a contract, to which as here the State was not a party, between the Executive Branch and an Indian tribe; that in any event the federal implementing statutes (which did not mention Art. 6) did not render the State's game laws inapplicable to the Indian beneficiaries of the Agreement; and that Art. 6 was merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians also would be permitted to hunt there. *Held*:

1. The ratifying legislation must be construed in the light of the longstanding canon of construction that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. Pp. 5–6.

2. The Supremacy Clause precludes application of the state game laws here since the federal statutes ratifying the 1891 Agreement between the Executive Branch and the Indian tribe is a "Law of the United States made in Pursuance" of the Constitution and therefore like all "Treaties made" is made binding upon affected States. Nor does the fact that Congress had abolished the contract-by-treaty method of dealing with Indian tribes affect Congress' power to *legislate* on the problems of In-

Syllabus

dians, including legislation ratifying contracts between the Executive Branch with Indian tribes to which affected States were not parties. *Choate* v. *Trapp*, 224 U. S. 665; *Perrin* v. *United States*, 232 U. S. 78. Pp. 6–10.

3. In ratifying the Agreement pursuant to its plenary constitutional powers Congress manifested no purpose of subjecting the rights conferred upon the Indians to state regulation, and in view of the unqualified ratification of Art. 6 any state qualification of those rights is precluded by the Supremacy Clause. Pp. 10–11.

4. Although the State is free to regulate non-Indian hunting rights in the ceded area, the ratifying legislation must be construed to exempt the Indians from like state control or Congress would have preserved nothing that the Indians would not have had without the legislation, which would have been "an impotent outcome to [the] negotiations," *United States* v. *Winans*, 198 U. S. 371, 380. Pp. 11–14.

82 Wash. 2d 440, 511 P. 2d 1351, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a concurring opinion. REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-717

Alexander J. Antoine et ux., Appellants, v. State of Washington. | On Appeal from the Supreme Court of Washington.

[February 19, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The appellants, husband and wife, are Indians. They were convicted in the Superior Court of the State of Washington [1] of the offenses of hunting and possession of deer during closed season in violation of RCW 77.16.020 and RCW 77.16.030.[2] The offenses occurred on September 11, 1971, in Ferry County on unal-

[1] The appellant husband is an enrolled member of the Confederated Tribes of the Colville Indian Reservation. Tribes that formed the Confederated Tribes included the Colville, Columbia, San Poil, Okanogan, Nez Perce, Lake, Spokane, and Coeur d' Alene. Appellant wife is a Canadian Indian and is not enrolled in the United States. We do not deal, however, with whether her case is for that reason distinguishable from her husband's since the State Supreme Court drew no distinction between them. Moreover, appellee State conceded at oral argument in this Court that reversal of the husband's conviction would require reversal of the wife's conviction. Tr. p. 22.

[2] RCW 77.16.020 provides in pertinent part:

"It shall be unlawful for any person to hunt . . . game animals . . . during the respective closed seasons therefor.

lotted non-Indian land in what was once the north half of the Colville Indian Reservation.[3] The Colville Confederated Tribes ceded to the United States that northern half under a congressionally ratified and adopted Agreement dated May 19, 1891. Article 6 of that ratified Agreement provided expressly that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."[4] Appellants' defense was that con-

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"Any person who hunts . . . deer in violation of this section is guilty of a gross misdemeanor . . . ."

RCW 77.16.030 provides in pertinent part:

"It shall be unlawful for any person to have in his possession . . . any . . . game animal . . . during the closed season . . .

. . . . . .

"Any person who has on his possession . . . any . . . deer . . . in violation of the foregoing portion of this section is guilty of a gross misdemeanor . . . ."

[3] The original reservation was over 3 million acres "bound on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions." Executive Order of July 2, 1872, 1 Kappler, Indian Affairs, Laws and Treaties 916 (2d ed. 1904); see also *Seymour* v. *Superintendent*, 368 U. S. 351, 354 (1962).

[4] Article 6 provides in full:

"It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."

The status of the southern half of the Colville Reservation was considered in *Seymour* v. *Superintendent*, *supra*, n. 3. At issue in this case are the residual rights to hunt and fish on the northern half preserved by the above Art. 6.

gressional approval of Art. 6 excluded from the cession and retained and preserved for the Confederated Tribes the exclusive, absolute and unrestricted rights to hunt and fish that had been part of the Indians larger rights in the ceded portion of the reservation, thus limiting governmental regulation of the rights to federal regulation and precluding application to them of RCW 77.16.020 and RCW 77.16.030. The Supreme Court of Washington held that the Superior Court had properly rejected this defense and affirmed the convictions, 82 Wn. 2d 440, 511 P. 2d 1351 (1973). We noted probable jurisdiction, 417 U. S. 966 (1974). We reverse.

I

President Grant established the original Colville Indian Reservation by Executive Order of July 2, 1872. Washington became a State in 1889, 26 Stat. 10, and the next year, by the Act of August 19, 1890, 26 Stat. 355, Congress created the Commission that negotiated the 1891 Agreement.[5] By its terms, the Tribes ceded the northern half of the reservation in return for benefits

[5] The Colville Indian Commission was composed of Chairman Fullerton, and Commissioners Durfur and Payne. The Commission first met on May 7, 1891, with representatives of the Confederated Tribes at Nespelem, Washington, on the reservation to discuss "a sale of a part of Reservation. . . ." During succeeding days, Ko-Mo-Del-Kiah, Chief of the San Poil, strongly opposed the sale of any part of the reservation, but Antoine, Chief of the Okanogan and great grandfather of appellant Alexander Antoine, Moses, Chief of the Columbia, and Joseph, Chief of the Nez Perce, favored the proposed 1891 Agreement as fair. At a later meeting on May 23 at Marcus on the reservation, Barnaby, Chief of the Colville, and the Chief of the Lake agreed to the proposed sale. Minutes of Colville Indian Commission Concerning Negotiation for the 1891 Agreement of Sale, National Archives Document 21167.

which included the stipulations of Art. 6 and the promise of the United States to pay $1,500,000 in five installments. The Agreement was to become effective, however, only "from and after its approval by Congress." Congressional approval was given in a series of statutes. The first statute was the Act of July 1, 1892, 27 Stat. 62, which "vacated and restored [the tract] to the public domain . . . ," and "open[ed] . . . [it] . . . to settlement. . . ." The second statute came 14 years later, the Act of June 21, 1906, 34 Stat. 325, 337–338. That statute in terms "carr[ied] into effect the Agreement," and authorized the appropriation of the $1,500,000. Payment of the $1,500,000 was effected by five subsequent enactments from 1907 to 1911, each of which appropriated $300,000 and recited that it was part payment "to the Indians on the Colville Reservation, Washington, for the cession of land opened to settlement by the Act of July first, eighteen hundred and ninety-two . . . being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act of June first, nineteen hundred and six, *ratifying the agreement* ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one . . . ." (Emphasis supplied.) 34 Stat. 1015, 1050–1051 (1907); 35 Stat. 70, 96 (1908); 35 Stat. 781, 813 (1909); 36 Stat. 269, 286 (1910); 36 Stat. 1058, 1075 (1911).[6]

[6] The delay in approval was occasioned by the initial reluctance of the House to ratify the Agreement without certain changes, 23 Cong. Rec. 3840, and by doubts raised in the Senate whether the Indians had title to the reservation, since it was created by Executive Order. See S. Rep. No. 664, 52d Cong., 1st Sess., p. 2. The Interior Department reported some years later that the doubts were unfounded. S. Rep. No. 2651, 59th Cong., 1st Sess., 137, 139. A bill passed by the House in 1891 replaced the $1,500,000 lump sum with a payment of $1.25 per acre, to be paid from the proceeds of sales of land opened for homesteading. The Senate dis-

The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. *Worcester* v. *Georgia*, 31 U. S. (6 Pet.) 515 (1832). See also *The Kansas Indians*, 72 U. S. (5 Wall.) 737, 760 (1866); *United States* v. *Kagama*, 118 U. S. 375 (1886); *Choctaw Nations* v. *United States*, 119 U. S. 1, 28 (1886); *United States* v. *Winans*, 198 U. S. 371, 380–381 (1905); *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912); *Menominee Tribe* v. *United States*, 391 U. S. 404, 406, n. 2 (1968). In *Choate* v. *Trapp*, *supra*, also a case involving a ratifying statute, the Court stated, "[t]he construction, instead of being strict,

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agreed, however, and passed a bill that ultimately became the Act of July 1, 1892. That Act makes no mention either of the consideration to be paid, or of the hunting and fishing rights preserved. Many protests were thereupon made that Congress had failed to live up to the terms of the Agreement. These included protests from the Department of the Interior, S. Rep. No. 2561, 59th Cong., 1st Sess., 137, 139, and from Chairman Fullerton, who had become Chief Justice of the Supreme Court of Washington. In a letter, S. Rep. No. 2561, *supra*, p. 40, the Chief Justice said:

"It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon their people and upon the heads of the tribes not to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie on earth, I cannot help a feeling of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation."

The many protests finally bore fruit and Congress enacted the Act of June 21, 1906, and the five subsequent installment acts. The Colville claims required the services of 16 lawyers from the States of Washington, Pennsylvania, and Georgia, and the District of Columbia. They recovered judgments against the United States for their services in the Court of Claims. *Butler and Vale* v. *United States*, 43 Ct. Cl. 497 (1908).

is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." 224 U. S., *supra*, at 675. See also *Seminole Nation* v. *United States*, 316 U. S. 286, 296 (1942); *Morton* v. *Ruiz*, 415 U. S. 199, 236 (1974). Thus, even if there were doubt, and there is none, that the words "[t]o carry into effect the [1891] agreement," in the 1906 Act, and the words "ratifying the [1891] agreement," in the 1907–1911 laws, ratified Art. 6, application of this canon would require that we construe the series of statutes as having ratified that Article.

II

Although admitted to statehood two years earlier, the State of Washington was not a party to the 1891 Agreement. The opinion of the State Supreme Court relies upon that fact to attempt a distinction for purposes of the Supremacy Clause [7] between the binding result upon the State of ratification of a contract by *treaty* effected by concurrence of two-thirds of the Senate, Art. II, § 2, cl. 2, and the binding result of ratification of a contract effected by legislation passed by the House and the Senate. The opinion states that "once ratified, a *treaty* becomes the supreme law of the land," but the ratified 1891 Agreement was a mere contract enforceable "only against those party to it," and "not a treaty . . . [and] . . .

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[7] Article VI, cl. 2, of the Constitution, the Supremacy Clause, provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

not the supreme law of the land." 82 Wn. 2d 444, 511 P. 2d 1354. The grounds of this attempted distinction do not clearly emerge from the opinion. The opinion states, however, "[t]he statutes enacted by Congress in implementation of this [1891] agreement . . . are the supreme law if they are within the power of Congress to enact . . . ." 82 Wn. 2d 451, 511 P. 2d 1358. In the context of the discussion in the opinion we take this to mean that the Congress is not constitutionally empowered to inhibit a State's exercise of its police power by legislation ratifying a contract between the Executive Branch and an Indian tribe to which the State is not a party. The fallacy in that proposition is that a legislated ratification of an agreement between the Executive Branch and an Indian tribe is a "Law of the United States made in Pursuance" of the Constitution and, therefore, like "all Treaties made," is made binding upon affected States by the Supremacy Clause.

The opinion seems to find support for the attempted distinction in the fact that, in 1891, the Executive Branch was not authorized to contract by treaty with Indian tribes as sovereign and independent nations. 82 Wn. 2d 444, 511 P. 2d 1354. Twenty years earlier, in 1871, 16 Stat. 544, 566, Congress had forbidden thereafter recognition of Indian nations and tribes as sovereign independent nations, and thus had abrogated the contract by treaty method of dealing with Indian tribes.[8] The Act of 1871 resulted from the opposition of the House of Representatives to its practical exclusion

[8] The Act of March 3, 1871, 16 Stat. 544, 566, 25 U. S. C. § 71 provided:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

from any policy role in Indian affairs. For nearly a century the Executive Branch made treaty arrangements with the Indians "by and with the Advice and Consent of the Senate," Art. II, § 2, cl. 2. Although the House appropriated money to carry out these treaties, it had no voice in the development of substantive Indian policy reflected in them. House resentment first resulted in legislation in 1867 repealing "all laws allowing the President, the Secretary of the Interior, or the Commissioner of Indian Affairs to enter into treaties with any Indian tribes," Act of March 28, 1867, 15 Stat. 7, 9, but this was repealed a few months later, Act of July 20, 1867, 15 Stat. 18. After further unsuccessful House attempts to enter the field of federal Indian policy, the House refused to grant funds to carry out new treaties. United States Department of the Interior, *Federal Indian Law*, 1958, at 211. Finally, the Senate capitulated and joined the House in passage of the 1871 Act as a rider to the Indian Appropriation Act of 1871. *Federal Indian Law, supra,* at 138.[9]

This meant no more, however, that that after 1871 relations with Indians would be governed by Acts of

[9] Former Commissioner of Indian Affairs Walker summarized the struggle as follows:

"In 1871, however, the insolence of conscious strength, and the growing jealousy of the House of Representatives towards the prerogative—arrogated by the Senate—of determining, in connection with the executive, all questions of Indian right and title, and of committing the United States incidentally to pecuniary obligations limited only by its own discretion, for which the House should be bound to make provision without inquiry, led to the adoption, after several severe parliamentary struggles of the declaration . . . that hereafter 'no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty.'" Federal Indian Law, *supra,* at 211–212, citing Walker, The Indian Question, 1874.

Congress and not by treaty. *Elk* v. *Wilkins*, 112 U. S. 94 (1884); *In re Heff*, 197 U. S. 488 (1905). The change in no way affected Congress' plenary powers to *legislate* on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties. Several decisions of this Court have long settled that proposition. In *Choate* v. *Trapp*, 224 U. S. 665 (1912), the Court held that tax exemptions contained in an 1897 agreement ratified by Congress between the United States and Indian tribes as part of a cession of Indian lands were enforceable against the State of Oklahoma, which was not a party to the agreement. In *Perrin* v. *United States*, 232 U. S. 78 (1914), the Court enforced a clause of an agreement ratified by Act of Congress that no intoxicating liquor should be sold on land in South Dakota ceded and relinquished to the United States, although South Dakota was not a party to the agreement. The Court expressly rejected the contention that the power to regulate the sale of intoxicating liquors upon all ceded lands rested exclusively in the State. Rather, because Congress was empowered, when securing the cession of part of an Indian reservation within a State, to prohibit the sale of intoxicants upon the ceded lands, "it follows that the State possesses no exclusive control over the subject and that the congressional prohibition is supreme." 232 U. S., at 483. See also *Dick* v. *United States*, 208 U. S. 340 (1908). These decisions sustained the ratified agreements as the exercise by Congress of its "plenary power . . . to deal with the special problems of Indians [that] is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to regulate commerce . . . with the Indian Tribes and thus, to this extent, singles Indians out as a proper subject for separate legislation."

Morton v. *Mancari*, 417 U. S. 535, 551–552 (1974); see also *Morton* v. *Ruiz*, 415 U. S. 199, 236 (1974).

Once ratified by Act of Congress, the provisions of the agreements become law, and like treaties, the supreme law of the land. Congress could constitutionally have terminated the northern half of the Colville Indian Reservation on the terms and conditions in the 1891 Agreement, even if that Agreement had never been made. *Maatz* v. *Arnett*, 412 U. S. 481 (1973). The decisions in *Choate*, *Perrin*, and *Dick*, *supra*, settle that Congress, by its legislation ratifying the 1891 Agreement, constituted those provisions, including Art. 6, "Laws of the United States . . . in Pursuance" of the Constitution, and the supreme law of the land, "superior and paramount to the authority of any State within whose limits are Indian tribes." *Dick* v. *United States*, *supra*, 208 U. S., at 353.[10]

III

The opinion of the State Supreme Court also holds that in any event the implementing statutes cannot be construed to render RCW 77.16.020 and RCW 77.16.030 inapplicable to Indian beneficiaries of the Agreement since the implementing statutes "make no reference to the provision [Article 6] relied upon by the appellants." 82 Wn. 2d 451, 511 P. 2d 1358. The opinion reasons, "if it was thought that state regulation but not federal regulation would constitute an abridgement, an express provision to that effect should have been inserted, but

[10] WRC 37.12.060, which assumes limited jurisdiction over Indians, expressly provides that the law shall not deprive any Indian of rights secured by agreement.

"Nothing in this chapter . . . shall deprive any Indian or any Indian tribe, band, community of any right, privilege, or immunity afforded under federal treaty, *agreement*, statute, or Executive Order with respect to Indian land grants, hunting trapping, or fishing or the control, licensing, or regulation thereof." (Emphasis added.)

only after the consent of the state had been sought and obtained." 82 Wn. 2d 448, 511 P. 2d 1357. This reasoning is fatally flawed. The proper inquiry is not whether the State was or should have been a consenting party to the 1891 Agreement, but whether appellants acquired federally guaranteed rights by congressional ratification of the Agreement. Plainly appellants acquired such rights. Congress exercised its plenary constitutional powers to legislate those federally protected rights into law in enacting the implementing statutes that ratified the Agreement. No congressional purpose to subject the preserved rights to state regulation is to be found in the acts or their legislative history. Rather, the implementing statutes unqualifiedly, "carr[ied] into effect" and "ratif[ied]" the explicit and unqualified provision of Art. 6 that "the right to hunt and fish . . . shall not be taken away or in anywise abridged." State qualification of the rights is therefore precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State was required to achieve that result.

IV

Finally, the opinion of the State Supreme Court construes Art. 6 as merely a promise by the United States that so long as it retained any ceded land and allowed others to hunt thereon, Indians would be allowed also to hunt there. 82 Wn. 2d, at 449–450, 511 P. 2d, at 1357–1358. But the provision of Art. 6 that the preserved rights are not exclusive and are to be enjoyed "in common with all other persons," does not support that interpretation or affect the Supremacy Clause's preclusion of qualifying state regulation. Non-Indians are, of course, not beneficiaries of the preserved rights and the State remains wholly free to prohibit or regulate non-Indian hunting

and fishing. The ratifying legislation must be construed to exempt the Indians' preserved rights from like state regulation, however, else Congress preserved nothing which the Indians would not have had without that legislation. For consistency with the canon that the wording is not to be construed to the prejudice of the Indians makes it impermissible in the absence of explicit congressional expression, to construe the implementing acts as "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more." *United States* v. *Winans,* 198 U. S. 371, 380 (1905); *Puyallup Tribe* v. *Department of Game* (*Puyallup I*), 391 U. S. 392, 397–398 (1968). *Winans* involved a treaty that reserved to the Indians in the area ceded to the United States "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." 198 U. S., *supra,* at 378. *Puyallup* considered a provision that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . ." 391 U. S., *supra,* at 395. The Court held that rights so preserved "may, of course, not be qualified by the State. . . ." 391 U. S., *supra,* at 398; 198 U. S., *supra,* at 384. Article 6 presents an even stronger case since Congress' ratification of it included the flat prohibition that the right "shall not be taken away or in anywise abridged."

V

In *Puyallup Tribe* v. *United States, supra,* 391 U. S., at 398, we held that although, these rights "may . . . not be qualified by the State, . . . the manner of fishing [and hunting], the size of the take, the restriction of commercial fishing [and hunting] and the like may be regulated by the State in the interest of conservation, provided the

regulation meets appropriate standards and does not discriminate against the Indians." 391 U. S., *supra*, at 398. The "appropriate standards" requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, *Department of Game* v. *Puyallup Tribe*, 414 U. S. 44 (1973); *Tulee* v. *Washington*, 315 U. S. 681, 684 (1942), *and* that its application to the Indians is necessary in the interest of conservation.

The United States as *amicus curiae*, invites the Court to announce that state restrictions "cannot abridge the Indians' federally protected rights without [the State] demonstrating a compelling need" in the interest of conservation. Brief of the United States as *amicus curiae*, pp. 14–16. We have no occasion in this case to address this question. The State of Washington has not argued, let alone established, that applying the ban on out-of-season hunting of deer by the Indians on the land in question is in any way necessary or even useful for the conservation of deer. See *Hunt* v. *United States*, 278 U. S. 96 (1928).[11]

The judgment of the Supreme Court of the State of Washington sustaining appellants' convictions is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[11] Appellants apparently claim no right to hunt on fenced private property. The State Supreme Court stated:

"Counsel . . . conceded in oral argument that the present owners of land in the northern half of the reservation have the right to fence their land and exclude hunters. Nevertheless they maintain that state regulation of the right to hunt is an abridgement of that right . . . ." 82 Wn. 2d 448, 511 P. 2d 1356.

A claim of entitlement to hunt on fenced or posted private land without prior permission of the owner would raise serious questions not presented in this case.

SUPREME COURT OF THE UNITED STATES

No. 73–717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington.	On Appeal from the Supreme Court of Washington.

[February 19, 1975]

MR. JUSTICE DOUGLAS, concurring.

I agree with the opinion of the Court that Congress ratified the cession Agreement together with all the rights secured by the Indians, thus putting the Agreement under the umbrella of the Supremacy Clause.

In 1872 President Grant, by Executive Order,[1] established a reservation for Indian tribes who came to be known as the Colville Confederated Tribes. By the Act of August 19, 1890,[2] a commission was appointed by the President to negotiate with the Tribes for "the cession of such portion of said reservation as said Indians may be willing to dispose of . . . ." On May 9, 1891, the commission entered into an Agreement with the Tribes by which the latter ceded to the United States "all their right, title, claim and interest in" a tract of land constituting approximately the northern half of the reservation. Article 6 of the Agreement, however, provided that "the *right to hunt* and fish *in common with* all other persons on lands not allotted to said Indians *shall not be taken away or in anywise abridged.*" (Italics added.)

In 1892 the Congress passed an Act restoring the northern tract to the public domain and opening it to

[1] Indian Reservations, Executive Orders 1855–1922, at 194–195.
[2] 26 Stat. 355.

settlement.[3] The Agreement had promised the Indians payment of $1,500,000 in cash by installments. The 1892 Act made no reference to it nor to the rights to fish and hunt. Therefore there was agitation for further action by Congress. In 1906 and succeeding years, Congress eventually acted, authorizing and appropriating the money in five installments.[4] Each Act is essentially the same, appropriating the sum of $300,000:

> "In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by [the 1892 Act], being a part of the full sum set aside . . . in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, *ratifying the agreement ceding said land to the United States* under date of May ninth, eighteen hundred and ninety-one . . . ."[5] (Italics added.)

The Agreement and its ratification were made after the practice of making treaties with Indian tribes ended.[6] Yet "the Laws of the United States" as well as "all Treaties" are covered by the Supremacy Clause of the

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[3] 27 Stat. 62.

[4] The authorization appears at 34 Stat. 325, 337–338. The appropriations appear at 34 Stat. 1015, 1050–1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; and 36 Stat. 1058, 1075.

[5] The quoted language is from the 1907 Appropriations Act, 34 Stat. 1015, 1050–1051.

[6] See Act of March 3, 1871, 16 Stat. 544, 566, 25 U. S. C. § 71:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

Constitution, Art. VI, cl. 2. We so held recently in *Morton* v. *Mancari*, 417 U. S. 535 (1974); *Morton* v. *Ruiz*, 415 U. S. 199 (1974). And see *Choate* v. *Trapp*, 224 U. S. 665 (1912); *Perrin* v. *United States*, 232 U. S. 478 (1914).

The pressures on Congress to live up to its Agreement were great and are discussed in S. Rep. No. 2561, 59th Cong., 1st Sess., pp. 134–140. Would Congress stand by the "Agreement" of 1891? The head of the Commission that negotiated the Agreement with the Indians was Mark A. Fullerton, who in 1904 was Chief Justice of the Supreme Court of Washington. He stated his views:

> ". . . I can not understand why the right of the Indians to this land is not just as sacred as it would have been had it been awarded to them under the most solemn treaty. When they entered upon the reservation they gave up forever land in which they had title as absolute as any band of Indians ever had to any land; and even though the exchange was a forced one, yet exchange it was, and the Government was, under its promise, as I believe, in all honor and right bound to respect it as an exchange and protect the Indians in their title accordingly. Legally, therefore, I can see no difference between the rights of these Indians to compensation for the land taken and the rights of the Puyallup, the Wyakimas, and the Nez Perces to the lands on their reservations which the Government has taken, and which the right to compensation was not even questioned; and, morally, certainly it would be hard to make a distinction.
>
> "It may be that my relations to this transaction have somewhat warped my judgment, but when I recall the impassioned appeals made by some of the aged members of these remnant bands, calling upon

> their people and upon the heads of the tribes not to sign away their lands, even though the compensation offered was ample, on the ground that it was their last heritage and their last tie to earth, I can not help a feeling of bitterness when I remember that the Government, whom we represented to them as being just and honorable, took away their land without even the solace of compensation." [7]

The "right to hunt and fish in common with all other persons on lands not allotted to said Indians" plainly covers land ceded and held as public lands and also land ceded and taken up by homesteaders, for the reservation of the "right" contains no exception. As to all such lands the 1891 Agreement seems clear—the hunting and fishing right "shall not be taken away or in anywise abridged." As the Solicitor General says, that is "strong language." It has long been settled that a grant of rights—in the first case, fishing rights—on an equal footing with citizens of the United States would not be construed as a grant only of such rights as other inhabitants had: As stated in *United States* v. *Winans*, 198 U. S. 371, 380 (1905), "This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." That was our view in *Puyallup Tribe* v. *Department of Game*, 391 U. S. 392 (1968). A "right" which the Federal Government grants an Indian may "not be qualified or conditioned by the State," *id.*, at 399.

I agree with the Court that conservation measures, applicable to all, are available to the State, *id.*, at 398–403; but discrimination against the Indians by conservation measures is not permissible, *Washington Game Dept.* v. *Puyallup Tribe*, 414 U. S. 44, 48 (1973). In any event no conservation interest has been tendered here.

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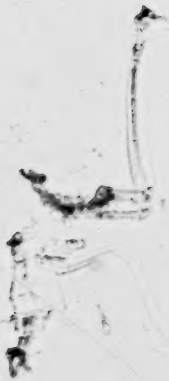
[7] S. Rep. No. 2561, 59th Cong., 1st Sess., p. 140.

The record in this case is devoid of any findings as to conservation needs or conservation methods. The State boldly claims that its power to exact a hunting license from all hunters qualifies even the Indian's right to hunt granted by Congress, irrespective of any conservation need. A State may do that when it comes to non-Indians or to Indians with no federal hunting rights, *Lacoste* v. *Dept. of Conservation*, 263 U. S. 545, 549 (1924). But Indians with federal hunting "rights" are quite different.

An effort is made to restrict these hunting rights to public lands, not to tracts ceded by this Agreement and taken up by private parties. The Agreement, however, speaks only of the ceded tract, not the ultimate disposition of the several parts of it. We would strain hard to find an implied exception for parcels in the ceded tract that ended in private ownership. The general rule of construction governing contracts or agreements with Indians is apt here:

> ". . . The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . . ." *Choate* v. *Trapp*, 224 U. S., at 675.

Whether the result would be different if the contest were between the owner of the private tract and the Indian is a question that need not be reached. We have here only an issue involving the power of a State to impose a regulatory restraint upon a right which Congress bestowed on these Indians. Such an assertion of state power must fall by reason of the Supremacy Clause.



SUPREME COURT OF THE UNITED STATES

No. 73–717

Alexander J. Antoine et ux., Appellants, *v.* State of Washington.	On Appeal from the Supreme Court of Washington.

[February 19, 1975]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, dissenting.

I do not agree with the Court's conclusion, *ante*, p. 4, that "[c]ongressional approval was given" to the provisions of Art. 6 of the agreement of May 19, 1891.

The Supremacy Clause of the Constitution specifies both "Laws" and "Treaties" as enactments which are the supreme law of the land, "anything in the Constitution or Laws of any State to the Contrary notwithstanding." If the game laws enacted by the State of Washington, containing customary provisions respecting seasons in which deer may be hunted, are invalid under the Supremacy Clause, they must be so by virtue of either a treaty or a law enacted by Congress. Concededly the agreement of 1891, between Commissioners appointed by the President and members of the Colville and Confederated Indian Bands, was not a treaty; it was not intended to be such, and Congress had explicitly provided 20 years earlier that Indian tribes were not to be considered as independent nations with which the United States could deal under the treaty power. Washington's game laws, therefore, can only be invalid by reason of some law enacted by Congress.

The Court's opinion refers us to the Act of Congress of June 21, 1906, which authorized monetary compensation to the Colvilles for the termination of the northern

half of their reservation, and to a series of appropriations measures enacted during the following five years. There is, however, not one syllable in any of these acts about Indian hunting or fishing rights, and it is fair to say that a member of Congress voting for or against them would not have had the remotest idea, even from the most careful of readings, that they would preserve Indian hunting and fishing rights. But because the language in the Act of 1906 states that it was enacted for the purpose of "carrying out" the agreement of 1891, and because language in subsequent appropriations acts described the Act of 1906 as "ratifying" the agreement of 1891, the Court concludes that Congress enacted as substantive law all 12 articles of the agreement.

The Court relies on three earlier decisions of this Court as settling the proposition that Congress could legislatively ratify the 1891 agreement, and that once accomplished, "The legislative ratification constituted the provisions of the 1891 Agreement . . . 'Laws of the United States . . . in Pursuance' of the Constitution, and the supreme law of the land." *Ante*, p. 9. Congress *could* undoubtedly have enacted the provisions of the 1891 agreement, but the critical question is whether it *did* so. Far from supporting the result reached by the Court in this case, the decisions of this Court in *Choate* v. *Trapp*, 224 U. S. 665 (1912), *Perrin* v. *United States*, 232 U. S. 478 (1914), and *Dick* v. *United States*, 208 U. S. 340 (1908), show instead how virtually devoid of support in either precedent or reason that result is.

Each of those cases did involve an agreement negotiated between Commissioners representing the United States and Indian bands and tribes. Each of the agreements was held to have been ratified by Congress, and its substantive provisions to have thereby been made law. But the contrast with the manner in which Congress ac-

complished ratification in those cases, and the manner in which it acted in this case, is great indeed.

Choate involved the Atoka Agreement negotiated between the Dawes Commission and Choctaw and Chickasaw representatives in 1897. The following year, Congress enacted the Curtis Act, 30 Stat. 495, the relevant provisions of § 29 of which are as follows:

> "That the agreement made by the Commission to the Five Civilized Tribes with commissions representing the Choctaw and Chickasaw Tribes of Indians on the 23rd day of April, 1897, as herein amended, is hereby ratified and confirmed . . . ." *Id.*, at 505.

The section then proceeds to set out *in haec verba* the full text of the Atoka Agreement.

Perrin v. *United States, supra,* involved the sale of liquor on ceded land, contrary to a prohibition contained in the cession agreement negotiated with the Sioux Indians in December 1892. That agreement was ratified by Congress in an Act of August 15, 1894, 28 Stat. 286, 314, in which Congress used much the same method as it had employed in *Choate:*

> "Sec. 12. The following agreement, made by . . . is hereby accepted, ratified, and confirmed."

Then followed, within the text of the Act of Congress itself, the articles of agreement *in haec verba.* Likewise, ratification of the agreement involved in *Dick, supra,* was accomplished by explicit statutory language and *in haec verba* incorporation of the articles of agreement.

The Court today treats the Act of June 21, 1906, as simply another one of these instances in which Congress exercised its power to elevate mere agreements into the supreme law of the land. But it has done so with little attention to the critical issue, that of whether Congress

actually exercised this power. Whereas the exercise was manifest in *Choate, Perrin,* and *Dick,* it is evidenced in the present case by nothing more than little scraps of language, ambiguous at best, in several Acts of Congress which contain not a word of the language of Art. 6 of the 1891 agreement. I think consideration of all of the legislative materials, including the actual language used by Congress on the occasions when it spoke, rather than the elided excerpts relied upon by the Court, show that there was no ratification of Art. 6.

The original Colville Reservation was created by Executive order in 1872. It consisted of over three million acres lying between the Okanogan and Columbia Rivers in the northern part of the State of Washington. In 1890 Congress created a Commission to "negotiate with said Colville and other bands of Indians on said reservation for the cession of such portion of said reservation as said Indians may be willing to dispose of, that the same may be open to white settlement." 26 Stat. 336, 355. The following year Commissioners appointed by the President met with representatives of the Confederated Colville Tribe. The agreement of May 19, 1891, was executed to "go into effect from and after its approval by Congress."

Article 1 of the agreement provided that the northern half of the Colville Reservation, as it existed under the Executive Order of 1872, should be vacated. Article 5 provided that "in consideration of the cession surrender and relinquishment to the United States" of the northern half of the reservation, the United States would pay to the members of the tribe the sum of $1,500,000. Article 6, quoted in the opinion of the Court, contained provisions respecting tax exemption and Indian hunting and fishing rights.

The agreement was presented to the 52d Congress for

ratification, but that body adamantly refused to approve it. The characterization in the Court's opinion of the Act of July 1, 1892, 27 Stat. 62, as the "first" in a series of statutes in which congressional approval was given to the agreement of May 19, 1891, is a bit of historical legerdemain. Doubts were expressed as to whether the Indians had title to the reservation, since it had been created by Executive order, thus again highlighting disagreement between the Executive and Legislative Branches as to how best to deal with the Indian tribes.

The Act of July 1, 1892, vacated the northern half of the Colville Reservation, as it had been established by President Grant, "notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians," and declared that "the same shall be open to settlement and entry of the proclamation of the President of the United States and shall be disposed of under the general laws applicable to the disposition of public lands in the State of Washington." 27 Stat. 62, 63. Section 4 of the Act tracked Art. 2 of the agreement, providing that each Indian then residing on the ceded portion of the Reservation should be entitled to select 80 acres of the ceded land to be allotted to him in severalty. Section 5 of the Act tracked Art. 3 of the agreement, providing that Indians then residing in the ceded portion of the Reservation should have a right to occupy and reside on its remaining parts, if they chose that in preference to receiving an allotment. Section 6 of the Act tracked Art. 4 of the agreement, and concerned various school and mill sites within the ceded portion.

But conspicuous by their absence from the Act of July 1, 1892, were any provision for the payment of the $1,500,000, and any reference whatsoever to the agreement's provisions dealing with hunting and fishing rights and

immunity from taxation. Far from being the "first" of a series of acts ratifying the entirety of the 1891 agreement, the Act provided, in § 8:

> "That nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of the said Colville Reservation, whether that hereby restored to the public domain or that still reserved by the Government for their use and occupancy." 27 Stat. 64.

The Act of July 1, 1892, became law without the signature of President Harrison. Members of the Federated Colville Tribes became justifiably alarmed that it had terminated the northern half of the Reservation without authorizing the compensation for which they had bargained. After a 14-year campaign, described in detail in the report of *Butler and Vale* v. *United States*, 43 Ct. Cl. 497 (1908), they obtained congressional relief. But the relief embodied in the statutes enacted in 1906 and subsequent years did not amount to a full adoption and ratification of the 1891 agreement. Rather, the description of the efforts to obtain relief, as well as the legislation which resulted, demonstrate that the Indians were concerned only with the compensation promised by the 1891 agreement, and not with whatever ancillary rights were accorded by its Art. 6.

The following excerpts from the Court of Claims opinion, which would appear to have the added authenticity that is given by contemporaneity, describe some of the events:

> "In pursuance of the [1891] agreement the lands so ceded were by act of Congress thrown open to public settlement; but no appropriation of money was made, *and that part of the agreement providing for its payment was never complied with until the*

passage of the act of June 21, 1906. The Indians became anxious and, justly, quite solicitous Their appeals to the Congress subsequent to their agreement was met in 1892 by an adverse report from the Senate Committee on Indian Affairs, in which *their right to compensation as per agreement was directly challenged* by a most positive denial of their title to the lands in question.

"In May, 1894, the said Colville Indians entered into a contract with Levi Maish, of Pennsylvania, and Hugh H. Gordon, of Georgia, attorneys and counselors at law, by the terms of which *the said attorneys were to prosecute their said claim against the United States and receive as compensation therefor 15 per cent of whatever amount they might recover.* . . . Nothing was accomplished for the Indians under the Maish-Gordon contract. Notwithstanding its expiration, however, a number of attorneys claim to have rendered efficient services and to have accomplished, by the permission and authority of the Congress and the committees thereof, *the final compliance with the agreement of 1891 and secured by the act of June 21, 1906, an appropriation covering the money consideration mentioned in said agreement.*" 43 Ct. Cls., at 514–515 (emphasis added).

The agreement which formed the basis of the suit in *Butler and Vail* was, as just described, entered into between the Colvilles and two attorneys whom they retained to press their claim. It too recites that the Indians' concern was directed to the Government's failure to compensate them for the northern half of the Reservation:

"And whereas the principal consideration to said Indians for the cession and surrender of said portion

of the reservation was the express agreement upon the part of the United States Government to pay to said Indians 'the sum of one million five hundred thousand dollars ($1,500,000)' . . . ;

"And *whereas the United States Government has failed to comply with the terms of said agreement, and no provision has been made to pay said Indians* the amount stipulated in the said agreement for the cession of said lands;

"And whereas the said Indians entered into said agreement with an implicit trust in the good faith of the United States Government, and now *most earnestly protest that their lands should not be taken from them without the payment of the just compensation stipulated in said agreement* . . . .

. . . . . .

"The purpose of this agreement is to secure the presentation and prosecution of the claims of said Indians *for payment for their interest in said ceded lands* and to secure the services of said Maish and Gordon as counsel and attorneys for the prosecution and collection of said claims." *Id.*, at 502 (emphasis added).

Similarly, the letter of protest by the Chairman of the Colville Indian Reservation, *ante*, p. 6, focused solely on Congress' failure to provide the Indians "the solace of compensation."

As a result of the efforts of the Indians, their friends, and their attorneys, Congress ultimately acceded to their claim for compensation. It did so in the Act of June 21, 1906, which is the Indian Department Appropriations Act of 1906. With respect to the Confederated Colville Tribes, the Act provided as follows:

"To carry into effect the agreement bearing date May 9, 1891, . . . there shall be set aside and held

> in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for 1,500,000 acres of land opened to settlement by the Act of Congress, . . . approved July 1, 1892, the sum of $1,500,000 . . . ." 34 Stat. 325, 377–378.

This Act is surely the major recognition by Congress of the claims of the Colvilles, and even with the most liberal construction I do not see how it can be read to do more than authorize the appropriation of $1,500,000 to effectuate the compensation article of the 1891 agreement. Not a word is said about tax exemption, nor about hunting and fishing rights.

The Court also relies on language in the Indian Department Appropriations Act of 1907, 34 Stat. 1015, and identical language in each of the succeeding four annual Indian Department appropriations acts. After the usual language of appropriation, the Act goes on to provide:

> "In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of 1,500,000 acres of land opened to settlement by an Act of Congress . . . approved July 1, 1892, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act approved June 21, 1906, ratifying the agreement ceding said land to the United States under the date of May 9, 1891, $300,000. . . ." *Id.*, 1050–1051.

Thus the Court rests its decision in this case on two legislative pronouncements. The first is the 1906 Act authorizing payment of money to the Colvilles and reciting that the authorization was made to "carry into effect" the 1891 agreement. The second is the series of acts appropriating funds to cover the 1906 authorization and

referring to the authorization as "ratifying the agreement ceding said land." On the basis of these acts, both of which are part of the mechanism by which Congress expends public funds, the Court has concluded that provisions of the 1891 agreement utterly unrelated to the payment of money became the supreme law of the land, even though there is no indication that the Colvilles sought any relief other than with respect to the Government's failure to pay compensation, or that Congress intended any relief affecting the *use* of land it quite plainly had determined should be returned to the public domain.

A far more reasoned interpretation of these legislative materials would begin by placing them in the context of the executive/legislative dispute over Indian policy and authority. A year after the signing of the 1891 agreement, Congress clearly indicated its doubt as to whether President Grant was justified in setting aside three million acres for the Colvilles, and as to whether his Executive order actually conveyed title. In the Act of July 1, 1892, Congress chose to take what the Indians had expressed a willingness to surrender, but to give only part of what the Commissioners had agreed the Government should give in return. The Colvilles, after a 14-year battle in and around the legislative halls of Congress, obtained the monetary relief which they sought. Sympathy with their plight should not lead us now to distort what is on its face no more than congressional response to demands for payment into congressional enactment of the entire 1891 agreement.

I would affirm the judgment of the Supreme Court of Washington.